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Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts

Eric Schnapper[†]

[A] grunting sound that sounded like “um um um.”

Noises deemed insufficiently offensive to support a sexual harassment claim in the Seventh Circuit.¹

[G]uttural noises . . . a purring or growling noise made in the throat.

Noises deemed sufficiently offensive to support a sexual harassment claim in the Eighth Circuit.²

In *Meritor Savings Bank, FSB v Vinson*,³ the Supreme Court established the basic rationale and standards for what was then a relatively new type of employment discrimination claim — sexual harassment. The defendant in *Meritor* did not deny that sexual harassment drew a distinction based on gender; to the contrary, it evidently acknowledged that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that super-

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¹ *Baskerville v Culligan International Co*, 50 F3d 428, 430 (7th Cir 1995).

² *Hathaway v Runyon*, 132 F3d 1214, 1217 (8th Cir 1997); *id* at 1222 (“[t]he jury heard Hathaway reproduce the noises that disturbed her, and it credited her position that this pattern of behavior created a hostile work environment”); see also *Mendoza v Borden, Inc*, 158 F3d 1171, 1175 (11th Cir 1998) (“a sniffing sound”); *Williamson v City of Houston*, 148 F3d 462, 463 (5th Cir 1998) (“whistling and purring at [victim]”); *Kimzey v Wal-Mart Stores, Inc*, 107 F3d 568, 570 (8th Cir 1997) (harasser “smacked his lips and made kissing noises”).

³ 477 US 57 (1986).

visor 'discriminate[s]' on the basis of sex."⁴ Instead, the employer argued that such discrimination is only illegal when it brings about a very severe and undoubtedly uncommon type of harm, causing "'tangible loss' of 'an economic character.'"⁵ The Supreme Court unanimously rejected this argument. Title VII, the Court said, "strike[s] at the entire spectrum of disparate treatment of men and women."⁶ *Meritor* announced the now widely cited formulation that the defendant will be liable for harassment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁷

In 1993, seven years after *Meritor*, the Court faced a narrower question in *Harris v Forklift Systems, Inc*⁸ — whether psychological harm was a prerequisite to a cause of action for a hostile work environment.⁹ In *Harris* the lower court had dismissed a hostile work environment claim because the harassment had not caused a specific type of serious injury, harm "so severe as to be expected to seriously affect [Harris'] psychological well-being."¹⁰ In dismissing the case, the district court was following the Sixth Circuit decision in *Rabidue v Osceola Refining Co.*¹¹ The *Rabidue* rule limited sexual harassment claims — the very claims declared actionable by *Meritor* — to cases where the harassment had caused (or nearly caused) a nervous breakdown.¹² The *Rabidue* restriction was clearly inconsistent with *Meritor's* insistence that Title VII reaches "the entire spectrum" of discriminatory treatment. Apparently this inconsistency was obvious to the Supreme Court: it decided *Harris* a mere twenty-seven days after hearing oral argument.¹³ Even Justice Scalia believed that *Harris* largely resolved any major remaining questions about the legal elements of a hostile work environment case. He suggested that

⁴ Id at 64 (alteration in original).

⁵ Id.

⁶ Id (internal quotations and citations omitted), quoting *Los Angeles Dept of Water and Power v Manhart*, 435 US 702, 707 n 13 (1978).

⁷ 477 US at 67, quoting *Henson v Dundee*, 682 F2d 897, 904 (11th Cir 1982) (alteration in original). This article does not deal with the somewhat distinct issues raised by quid pro quo harassment.

⁸ 510 US 17 (1993).

⁹ Id at 22 (holding that psychological harm is not required to prevail on a hostile work environment claim).

¹⁰ Id at 20.

¹¹ 805 F2d 611 (6th Cir 1986).

¹² Id at 620 (requiring that actionable harassment "affect seriously the psychological well-being of [a] reasonable person under like circumstances").

¹³ *Harris* was argued on October 13, 1993, and decided on November 9, 1993. 510 US at 17.

the language of the majority opinion would leave "virtually unguided juries [to] decide whether sex-related conduct . . . is egregious enough to warrant an award of damages."¹⁴ Justice Scalia disavowed the imposition of any additional legal standards that would further restrict jury evaluation of hostile environment cases, frankly stating, "I know of no alternative to the course the Court today has taken."¹⁵

Yet there were signs at the time of *Harris* that the underlying issues would not be easily resolved. First, the rule in *Rabidue*, which by the date of *Harris* had been adopted by several other circuits,¹⁶ obviously would have significantly undermined the Court's earlier unanimous decision in *Meritor*. Sexual harassment that leads to severe psychological injury — the only non-economic hostile environment cases permitted by *Rabidue* — will probably be rare, if only because most victims would resign before such serious, and likely irreparable, harm had occurred. The courts of appeals do not ordinarily adopt legal standards which, as a practical matter, would foreseeably eviscerate a recent and controlling Supreme Court precedent.

Second, despite the fact that the *Rabidue* rule would have been a boon to employers (since it would have largely ended sexual harassment litigation outside of the quid pro quo context), the defendant in *Harris* flatly refused to defend *Rabidue*'s "serious psychological injury" rule.¹⁷ None of the business groups which filed amicus briefs in support of *Harris* were willing to urge adoption of the *Rabidue* standard.¹⁸ This surprising reticence to endorse a favorable precedent undoubtedly reflected their judgment that the Sixth Circuit's *Rabidue* standard was so extreme that no member of the Supreme Court — well populated though it was with conservatives — was likely to endorse it.

Harris might have ended further controversy in the lower courts if the serious psychological injury rule in *Rabidue*¹⁹ had simply been based on some misreading of a term in Title VII, or of a passage in *Meritor*, or if the doctrine had been derived from some ill-fashioned turn of phrase in a lower court opinion. But

¹⁴ Id at 24 (Scalia concurring).

¹⁵ Id.

¹⁶ See id at 20.

¹⁷ The employer "conced[ed] that a requirement that the conduct seriously affect psychological well-being is unfounded." 510 US at 23.

¹⁸ Brief of Amicus Curiae of the Equal Employment Advisory Council in Support of Respondent, No 92-1168. The EEAC filed this brief on behalf of its 270 corporate members. Id at 2.

¹⁹ See 805 F2d at 620.

the district court and court of appeals decisions in *Rabidue* had adopted that standard as a method of implementing a clearly articulated and quite sweeping attack on the whole idea of sexual harassment.²⁰ The *Rabidue* trial judge, Stewart Newblatt, wrote an impassioned decision advancing views that even counsel for the defendant had not advocated.²¹ The Sixth Circuit judges, Robert Krupansky and H. Ted Milburn, endorsed and elaborated on Judge Newblatt's theories of the standard of legality for sexual harassment. But in *Harris*, no party or amicus thought it prudent to advance in the Supreme Court the theories articulated by Newblatt, Krupansky, and Milburn. Therefore, when deciding *Harris*, the Supreme Court never had occasion to consider the strikingly indulgent attitude toward sexual harassment that underlay the *Rabidue* rule. Although the *Rabidue* doctrines, discussed below,²² largely disappeared for a year after *Harris*, they reemerged in the 1995 Seventh Circuit decision *Baskerville v Culligan International Co.*,²³ and then quickly spread to other circuits.²⁴

Judges Newblatt, Krupansky and Milburn were intent on limiting Title VII to a small group of sexual harassment cases, and they saw the "serious psychological injury" rule as only one of several methods for achieving that restriction.²⁵ The district court and court of appeals decisions in *Rabidue* provided a full arsenal for bringing about that end. Any one of these methods — such as requirements that the alleged harassment unreasonably interfere with the victim's work performance, that the victim actually be offended, and that she suffer injury resulting from the hostile work environment²⁶ — would likely be enough to assure that most sexual harassment complaints would be dismissed as legally insufficient. In combination, these requirements threatened to bar nearly all sexual harassment claims. Although *Harris* disposed of the serious psychological injury rule, the remaining legal theories

²⁰ See Part I.

²¹ Interview with Barbara A. Klimaszewski, counsel for plaintiff (March 1999). [Editor's Note: The *University of Chicago Legal Forum* does not verify personal interviews.]

²² See text accompanying notes 36–41.

²³ 50 F3d 428 (7th Cir 1995). The court in *Baskerville* expressly relied on the earlier decision in *Rabidue*, 50 F3d at 431. But see text accompanying notes 347–52.

²⁴ See text accompanying note 356.

²⁵ The most direct account given by the court in *Rabidue* of the rationale for this requirement was that it was needed "[t]o accord appropriate protections to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case." 805 F2d at 620.

²⁶ See *id.*

endorsed by the *Rabidue* judges have persisted and grown in scope and complexity in the years since *Harris*.

The circumstances in *Harris* illustrate the magnitude of the problem that has emerged in the lower courts since 1993. The perpetrator in *Harris* had never touched the plaintiff, seriously propositioned her, or used vulgar language. Instead, the plaintiff complained that he had made off-color jokes, innuendos about the plaintiff's actions, and gender-related but non-sexual insults.²⁷ The Supreme Court noted that the district court had conducted a trial on the merits and had characterized the facts as presenting a "close case," even under the stringent *Rabidue* standards.²⁸ The Court remanded the case so that the lower court could apply the correct legal standards.²⁹ On remand, the district court concluded that the defendant was operating a hostile environment and that the conditions were so severe that the defendant had constructively discharged the plaintiff.³⁰ Under the *Rabidue*-like standards that are now applied by four or five circuits, however, a complaint alleging facts identical to those in *Harris* would be dismissed before trial as legally insufficient.

This Article describes how the courts of appeals have decided sexual harassment cases in the five years since *Harris*. In some circuits, events have unfolded largely as Justice Scalia anticipated: the trier of fact — ordinarily a jury — applies the hostile work environment standard announced in *Meritor* and elaborated upon in *Harris*.³¹

In stark contrast, four circuits continue to rely on the same rationales underlying the Sixth Circuit's decision in *Rabidue*. These courts have responded to *Meritor* and *Harris* with an array

²⁷ 510 US at 19.

²⁸ Id at 23 ("the [district] court found this to be a 'close case'").

²⁹ Id. Only a month after *Harris*, a Fourth Circuit panel including retired Justice Powell issued a per curiam decision which described the facts in *Harris* as illustrating what the Supreme Court believed "would make out a hostile working environment claim under Title VII." *Shope v Board of Supervisors of Loudon County*, 1993 US App LEXIS 33058, *6 (4th Cir) (unpublished disposition). The decision upheld a jury's finding in favor of the plaintiff. The record in *Shope* involved neither off-color remarks nor requests for sexual propositions, but was limited to disparaging remarks about women. Id at *4 (plaintiff admonished not to be "such a soft woman," warned that she was "too aggressive a woman," called a "stupid woman" and a "weak woman"). Under subsequent Fourth Circuit decisions, this case, that upheld a \$650,000 compensatory award, would now be dismissed as legally insufficient.

³⁰ *Harris v Forklift Systems, Inc.*, 66 FEP Cases (BNA) 1886 (M D Tenn 1994).

³¹ The Civil Rights Act of 1991, which for the first time authorized awards of compensatory damages, conferred on the parties to such a case a statutory right to a trial by jury. Pub L No 102-66, 105 Stat 1072 (1991), codified at 42 USC § 1981a (1994). Virtually all sexual harassment plaintiffs seek compensatory damages and ask for jury trials.

of exceptions to and loopholes in the prohibitions announced in those cases. Thus, harassment patterns and tactics that are clearly unlawful in much of the country are practically immune from attack in the Fourth, Fifth, Sixth, and Seventh Circuits. Because of the composition of the federal judiciary in those four circuits — where deciding whether a work environment is hostile is largely treated as a matter of law rather than a question of fact — it is a virtual certainty that mostly men, usually only men,³² will determine whether a particular pattern of harassment created a hostile work environment for women.

Part I of this Article describes the attitudes toward sexual harassment underlying the decision in *Rabidue* and its progeny, and explains how several circuits have continued and embellished those attitudes since *Harris*. Part II describes the dramatically different approaches that the circuit courts have taken toward the roles of judges and juries in hostile work environment cases. Part III considers the issues raised by harassment of women that is not sexual in nature. Part IV analyzes the problem of determining what types of harassing actions can be treated as an element of a hostile work environment claim. Part V sets forth the difficulties the lower courts have had applying *Meritor*'s "severe or pervasive" formula. Part VI considers what type of "environment" is unlawful under *Meritor* and *Harris*. Part VII discusses the interrelated arguments that women "accept" sexual harassment and that the law should tolerate harassment in certain occupations. Although the analysis focuses largely on sexual and other gender-based harassment, many of the same or similar issues arise in cases of racial or national origin harassment.

I. THE WORLD ACCORDING TO *RABIDUE*

The *Rabidue* opinions were avowedly based, not on the text or legislative history of Title VII, but on the authors' well-articulated ideas about the sensitivities of reasonable women and the culpability of alleged harassers. Modern women, they explained, really do not care if male workers use abusive or sexually explicit language or treat them as sexual objects; women accept that as just a normal part of life in the late twentieth century.

³² Two of the 17 judges on the Seventh Circuit are women, although Judge Ann C. Williams of the Northern District of Illinois was recently confirmed as a judge on the Seventh Circuit. See 145 Cong Rec S 14587 (Nov 10, 1999). Currently, the probability in this Circuit that a sexual harassment case will be decided by a panel in which women are the majority is only 2.2 percent. By contrast, in 67 percent of cases, only male judges will sit on a panel deciding these legal issues.

Any woman who still objects to such things is simply a Victorian prude. Men who do these things just cannot help themselves; it is simply a part of innocent human nature for many adult males to act this way. Post-*Harris* opinions continue to be strewn with such explanations, reminiscent of the era when some construction workers pretended to one another that they were showering welcome compliments on the passing women at whom they shouted sexually-explicit remarks.

A. Modern Women Don't Mind That Much

In *Harris v Forklift Systems, Inc.*,³³ the Supreme Court considered whether a sexual harassment plaintiff had to show that she had sustained psychological injury.³⁴ But the Sixth Circuit's decision in *Rabidue v Osceola Refining Co.*³⁵ had also contained a second, related requirement: that the plaintiff must also prove that a "reasonable" person would have sustained such an injury.³⁶ In a 1991 Seventh Circuit decision endorsing *Rabidue*, Judge Cummings justified this additional rule as "a check on claims for relief by the supersensitive 'eggshell' plaintiff."³⁷ In the Fourth Circuit Judge Murnaghan argued that this rule was essential "because '[a]n employee may not be unreasonably sensitive to his [or her] working environment."³⁸ In *Rabidue*, District Court Judge Newblatt downplayed the harasser's language as "annoying, but not so shocking or severe as to actually affect the psyches of female employees."³⁹ Judge Newblatt further explained that the language "merely constituted an annoying — but fairly insignificant — part of the total job environment."⁴⁰ On appeal in *Rabidue*, Circuit Judge Krupansky also dismissed the harasser's actions as only "annoying" but "not so startling as to have affected seriously the psyches of the plaintiff or other female employees."⁴¹

³³ 510 US 17 (1993).

³⁴ *Id.* at 20.

³⁵ 805 F2d 611 (6th Cir 1985).

³⁶ *Id.* at 620 (requiring plaintiff to prove that "defendant's conduct would have interfered with a reasonable individual's work performance").

³⁷ *Daniels v Essex Group, Inc.*, 937 F2d 1264, 1271 (7th Cir 1991).

³⁸ *Paroline v Unisys Corp.*, 879 F2d 100, 105 (4th Cir 1989) (alterations in original), vacated on other grounds, 900 F2d 27 (1990), quoting *Bristow v Daily Press, Inc.*, 770 F2d 1251, 1255 (4th Cir 1985) (citation and internal quotation marks omitted).

³⁹ *Rabidue v Osceola Refining Co.*, 584 F Supp 419, 432 (E D Mich 1984).

⁴⁰ *Id.* at 433.

⁴¹ 805 F2d at 622.

The judges' comments are significant in two distinct but interrelated ways. First, the view expressed by Newblatt and Krupansky — that the conduct was annoying, but not unlawful — may have reflected their belief that the actions complained of in *Rabidue* were mere peccadillos, barely more than harmless. "Annoying" is the sort of adjective an employee might use to describe a co-worker who was occasionally curt or boastful. In fact, the harasser in *Rabidue* regularly made comments about the female employees, including the plaintiff, which Judge Newblatt classified as "obscene," including routinely referring to those women as "whores," "cunt," "pussy" and "tits."⁴² It is difficult to believe that Newblatt or Krupansky would have used the word "annoyed" to describe an African-American worker who was called a "nigger." The judges' willingness to trivialize an epithet such as "cunt"⁴³ reflects either a profound unfamiliarity with the actual views and sensitivities of women, or an overarching predisposition to believe either that women simply do not mind sexual remarks very much, or that they regard them as complimentary.

Second, the insistence that the serious psychological injury rule is necessary to preclude claims by "oversensitive" women makes no sense unless a judge holds a fairly specific and unusual view about the difference between reasonable and "oversensitive" women. To many readers the argument might seem unintelligible, because we can readily imagine conduct that reasonable women would find utterly obnoxious but which would not lead them to the verge of a nervous breakdown. Justice O'Connor explained in *Harris* that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."⁴⁴ The argument made by Newblatt and Krupansky would make sense, however, if one assumes that a reasonable woman would never find that sexual harassment had created a hostile or abusive environment until the harassment had reached the very point at which it indeed caused serious psychological injury. On that premise, only "oversensitive" women would regard as abusive or hostile an environment which failed to meet the extraordinarily stringent *Rabidue* standard.

⁴² Id at 624 (Keith dissenting) (noting that one supervisor specifically remarked of plaintiff that, "All that bitch needs is a good lay.").

⁴³ Judge Krupansky's indulgent attitude toward this language is exemplified by a passage euphemistically referring to the supervisor's language as "off-color." Id at 622 n 7.

⁴⁴ 510 US at 22 (citation omitted).

The pre-*Harris* decisions rejecting *Rabidue* expressly disagreed with that opinion's assumptions about women. Referring specifically to the facts of *Rabidue*, the Third Circuit in *Andrews v City of Philadelphia*,⁴⁵ explained that:

Obscene language and pornography quite possibly could be regarded as "highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse." Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise.⁴⁶

The Ninth Circuit decision disapproving of the *Rabidue* rule indicated agreement with the contrary view that "[c]onduct that many men consider unobjectionable may offend many women."⁴⁷ This seems a fair characterization of the reasoning behind the *Rabidue* opinions.

Even after *Harris*, some lower courts remain preoccupied with concerns about oversensitive women filing harassment claims. Decisions in the Fifth⁴⁸ and Seventh⁴⁹ Circuits conjure up the specter of women of "Victorian" sensibilities objecting to actions or statements that assuredly would not bother truly modern women. In *Baskerville v Culligan International Co.*,⁵⁰ the alleged harasser had made a gesture "intended to suggest masturbation," "made a grunting sound that sounded like 'um um um'" when the plaintiff walked by, commented that it got "hot" when she entered

⁴⁵ 895 F2d 1469 (3d Cir 1990).

⁴⁶ Id at 1485-86 (citation omitted).

⁴⁷ *Ellison v Brady*, 924 F2d 872, 879 (9th Cir 1991).

⁴⁸ *Weller v Citation Oil & Gas Corp*, 84 F3d 191, 194 (5th Cir 1996); *DeAngelis v El Paso Municipal Police Officers Assn*, 51 F3d 591, 593 (5th Cir 1995).

⁴⁹ *Gleason v Mesirow Financial Inc*, 118 F3d 1134, 1146 (7th Cir 1997); *Baskerville v Culligan Intl Co*, 50 F3d 428, 431 (7th Cir 1995). In some instances this attitude is reflected in comments that seem cavalierly dismissive of the asserted abuses. In *Pickens v Runyon*, the court commented that "[m]any of [the plaintiff's] claims seem somewhat hypersensitive, and other 'evidence' upon which she relies . . . seems to us to be more like poor taste rather than harassment." 128 F3d 1151, 1157 (7th Cir 1997). The incidents complained of included the following: (1) the alleged harasser "put his arm around her, professed his love for her, and told her that if she did not reciprocate he would kidnap her and run away with her"; (2) the alleged harasser "cornered [plaintiff], grabbed her, hugged her, and attempted to 'stick his tongue' in her mouth"; (3) the alleged harasser grabbed the plaintiff and said, "Ms. Pickens, calm down before I am forced to kiss you"; (4) a different alleged harasser "asked Pickens, 'Do you have any black in you?' She replied, 'No, why?' He answered, 'Let me give you some'; and (5) another harasser commented, "You need a booty on your butt." Id at 1152-53.

⁵⁰ 50 F3d 428 (7th Cir 1995).

his office, and advised the plaintiff that one public address announcement really meant "[a]ll pretty girls run around naked."⁵¹ A jury concluded that the plaintiff had shown that her work environment was hostile, and the district judge sustained that verdict. A panel of the Seventh Circuit concluded that they had it all wrong:

It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy — a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity — would find Hall's patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain.⁵²

This passage does not purport to apply some legal standard to the facts, or to suggest that the plaintiff, jury and trial judge had misunderstood the meaning of Title VII. Rather, Judge Posner's point is that a sensible, modern woman in Ms. Baskerville's position would never have complained at all — not that Ms. Baskerville should not have brought suit, but that it was not reasonable for her even to seriously object to the manner in which she was being treated. Evidently no reasonable woman would find the supervisor's conduct harmful, and so a plaintiff could not use Title VII to make him stop. The women dismissed as overly sensitive throwbacks to the nineteenth century presumably included not only the plaintiff, but also any women on the jury, and the district court judge, Judge Suzanne Conlon.

A year later, in *Galloway v General Motors Service Parts Operations*,⁵³ Judge Posner explained that in *Baskerville*:

[W]e created a safe harbor for employers in cases in which the alleged harassing conduct is too tepid or intermittent or equivocal to make a reasonable person believe that she has been discriminated against on the basis of her sex.⁵⁴

Judge Coffey reiterated this point in *Gleason v Mesirow Financial, Inc.*⁵⁵ Several things about these opinions are noteworthy. First, these cases did not involve women who mistake perfectly

⁵¹ Id at 430.

⁵² Id at 431.

⁵³ 78 F3d 1164 (7th Cir 1996).

⁵⁴ Id at 1168.

⁵⁵ 118 F3d at 1144.

innocent actions for something improper. To the contrary, the safe harbor in *Galloway* is for "some sexual innuendo or gender slur,"⁵⁶ and in *Gleason* it is for "low-level harassment."⁵⁷ Furthermore, where the court discusses women who misapprehend whether they have been "discriminated against" it is not referring to women who unreasonably believe that their employers have violated Title VII, but to women who are unreasonable in thinking there is anything really wrong with the way they are being treated. Finally, a woman's misapprehension cannot be over whether the perpetrator had treated the victim differently because she was a woman — disparate treatment is implicit in the finding that a supervisor harassed the plaintiff or used a gender slur. Gender-based distinctions were obviously present in all of these cases. The boss in *Baskerville* did not make grunting sounds at men or gleefully remark upon the idea of "buff boys" running around naked. The spurned suitor who incessantly called Ms. Galloway a "bitch" had not attempted to romance any male co-workers. The supervisor in *Gleason* who made remarks about the size of one female employee's breasts and urged another to wear tighter skirts had not commented on the size of any male workers' penises or told any men he liked them better in tight pants. All three cases involved discrimination in the sense that women were treated differently from men, and indeed treated worse than men, because they were women.

The safe harbor doctrine seems intelligible only as an assertion that no discrimination was present in the sense that some gender-based distinctions are so harmless that no sensible person would call them "discriminatory" — like having separate washrooms or holding the door open for female co-workers. Thus Judge Posner said of *Galloway* what Judge Coffey said of *Gleason*, that she could not "rationally consider herself at a disadvantage in relation to her male co-workers."⁵⁸ This is a telling rhetorical flourish that goes beyond what was necessary to decide the case. If *Galloway* and *Gleason* were not at any disadvantage — if, in fact, their employers treated them as well, or as poorly, as they treated men — it would be irrelevant whether the plaintiffs believed otherwise, and it would be irrelevant whether their beliefs were reasonable. The appeals courts that ruled against these plaintiffs did not simply decide that they were not entitled to a

⁵⁶ 78 F3d at 1168.

⁵⁷ 118 F3d at 1144.

⁵⁸ *Galloway*, 78 F3d at 1168; *Gleason*, 118 F3d at 1145.

trial on the merits of their sexual harassment claims.⁵⁹ The courts went further, essentially deciding that the plaintiffs were irrational, or at least silly, for having complained at all about the treatment they had received because of their gender.

Two other lines of cases suggest a similar predisposition to believe that sexual harassment is harmless, if not welcome. The first line treats a woman's failure to complain about harassment as conclusive evidence that she had no objection to the conduct. In *Hartsell v Duplex Products, Inc.*,⁶⁰ the perpetrators warned the plaintiff shortly after she was hired, "[w]e've made every female in this office cry like a baby. We will do the same to you."⁶¹ Over the three months that passed until the plaintiff quit, the harassers insulted her in a variety of ways. They told her that she "would become the slave," admonished her to "go home and fetch your husband's slippers like a good little wife," and kicked and pushed her chair.⁶² The Fourth Circuit explained that "because Hartsell never complained to her husband or to the alleged harassers until [she resigned], she cannot prove 'that the harassment was unwelcome.'"⁶³

Another line of cases holds that participation in "office banter" can prove that the plaintiff welcomed the actions complained of; thus the court of appeals concluded that Hartsell welcomed the threat to reduce her to tears because she had later told "dumb blond" jokes and boasted she "could drink [one of the alleged harassers] under the table anytime."⁶⁴ In *Galloway*, the district judge insisted that the plaintiff "probably wasn't much upset" by the perpetrator's continually referring to her as a "sick bitch," because she responded with "coarse remarks."⁶⁵ However, Galloway's retort to her harasser that he should "take that nasty dick and stick it in [your] momma's mouth" cannot fairly be described as a pleasantry indicating enjoyment of the conduct that provoked it.⁶⁶

In *DeAngelis v El Paso Municipal Police Officers Association*,⁶⁷ the Fifth Circuit followed a variant of the *Rabidue*

⁵⁹ Both decisions upheld the granting of summary judgment for the employer.

⁶⁰ 123 F3d 766 (4th Cir 1997).

⁶¹ Id at 768 (internal quotation marks omitted).

⁶² Id at 768-69 (internal quotation marks omitted).

⁶³ Id at 774 n 7, quoting *Wrightson v Pizza Hut of America, Inc.*, 99 F3d 138, 142 (4th Cir 1996).

⁶⁴ 123 F2d at 769, 774 n 7 (internal quotation marks omitted).

⁶⁵ 78 F3d at 1165.

⁶⁶ Id (alteration in original).

⁶⁷ 51 F3d 591 (5th Cir 1995).

argument that reasonable women only object to the most extreme harassment. The *DeAngelis* court held that a sexual harassment victim must show that the harassment interfered with her job performance:

A hostile environment claim embodies conduct so egregious as to . . . destroy [the victim's] equal opportunity in the workplace. . . . [A] less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence [and] would mandate not equality but preference for women. . . . [I]t seems perverse to claim that [American women] need the protection of a preferential standard.⁶⁸

Like the analogous section in the *Rabidue* opinion, this passage is initially baffling — if women, but not men, are subject to daily insults, but are nonetheless able to maintain their job performance, how can it be a “preference” for a court to end insults directed only at those female workers? The argument only begins to make sense if one assumes that any harassment which does not interfere with job performance would necessarily be so harmless that only an oversensitive woman would mind.

B. It Wouldn't Offend Madonna

The *Rabidue* opinion also advanced an even more provocative argument, that a woman could not reasonably complain about a workplace that was no more obscene than the signs in store windows, or that was no more sexually explicit than American television programs. On this ground, District Judge Newblatt dismissed the plaintiff's objection to the posting in company offices of pictures of nude and half-naked women:

For better or worse, modern America features open displays of written and pictorial erotica. Shopping centers, candy stores and prime time television regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be *legally* offended by sexually explicit posters.⁶⁹

⁶⁸ Id at 593.

⁶⁹ *Rabidue v Osceola Refining Co*, 584 F Supp 419, 433 (E D Mich 1984).

Appeals Judge Krupansky insisted, on the same ground, that pictures of naked women in a corporate headquarters could not bother a reasonable woman, since she would already have been inured to such lurid spectacles by the world in which she lived:

The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, [the harasser's] vulgar language, coupled with the sexually oriented posters, did not result in a working environment that *could be* considered intimidating, hostile, or offensive.⁷⁰

These contentions are even more astonishing in light of the facts of each case. The posters that Judge Krupansky indulgently characterized as "sexually oriented" were not lingerie advertisements from the *New York Times*. One poster, which remained on the wall for eight years, "showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'"⁷¹ The *Rabidue* argument reappeared in Judge Posner's opinion in *Baskerville*.⁷² These cases suggest that the paradigmatic "reasonable woman" with whom a plaintiff should be compared is the brazen, bustier-clad strumpet that is the stage persona of the pop star Madonna.

Judge Keith's dissenting opinion in *Rabidue* correctly explained that the practices invoked by the majority were no guide to determining what women would regard as benign at the workplace, since women found many of these practices to be offensive in more public contexts too:

"Society" in [the majority's argument] must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof . . . stifles female po-

⁷⁰ *Rabidue v Osceola Refining Co*, 805 F2d 611, 622 (6th Cir 1986) (emphasis added).

⁷¹ *Id* at 624 (Keith dissenting).

⁷² See text accompanying note 52.

tential and instills the debased sense of self worth which accompanies stigmatization.⁷³

In fact it is not at all mysterious why many women who live in a society with a sex-saturated culture might object to the conduct discussed in *Baskerville*, *Galloway*, or *Gleason*. Much of that vulgarity is directed at appealing to men, many of whom (as publishers, broadcasters and advertisers well know) may enjoy a degree of explicitness that is distasteful to most women. The fact that *Hustler* and *Playboy* are sold to men and boys at thousands of newsstands does not mean that women would regard with equanimity an office plastered with pictures of naked women. The fact that modern culture accepts the notion that women would enjoy sex does not mean that they enjoy whatever unsolicited sexual contact, slurs or smarmy remarks any supervisor or co-worker might be inclined to inflict on them. Actions or words that a woman might welcome from her spouse or lover might well be entirely repugnant from anyone else, especially from a supervisor who may be in a position to impose his whims on her. Even in a sex-saturated culture, the difference between consent and coercion is still the difference between romance and rape.

C. The Guys Didn't Mean Any Harm

Judge Krupansky in *Rabidue* also suggested that sexual harassment should be tolerated, or at least regarded as more tolerable, when the perpetrators did not regard their conduct as wrong or even unusual. "[A] proper assessment" of a sexual harassment case, he insisted, required consideration of

the background and experience of the plaintiff, her co-workers, and supervisors, . . . [and] the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs. . . . Thus, the presence of actionable sexual harassment would be different depending upon . . . the prevailing work environment.⁷⁴

Judge Krupansky described as "aptly stated" Judge Newblatt's explanation that many men just act this way and cannot be expected to change:

⁷³ 805 F2d at 627 (Keith dissenting).

⁷⁴ Id at 620.

[I]t cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to — or can — change this. . . . Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.⁷⁵

These contentions are not limited to, or particularly about, the era when garage mechanics put up wall calendars depicting half naked women. Ms. Rabidue worked in an office where she monitored government regulations, oversaw the extension of credit to refineries that purchased petrochemicals from her employer, and dealt with corporate customers. The nude pictures she complained about were not posted in a roustabout's locker,⁷⁶ but in the office work areas.⁷⁷

This boys-will-be-boys attitude has, in the years since *Harris*, inspired several distinct lines of cases. First, a number of decisions insist that the touchstone of sexual harassment is not whether women are treated in a disparate manner that they find offensive, but whether the perpetrator harbored a predatory or misogynistic motive. Thus the harassment in *Galloway* was deemed non-discriminatory because it arose out of the perpetrator's anger that the victim had resisted his advances, not out of any belief "that women do not belong in the work force or are not entitled to equal treatment with male employees."⁷⁸ In *Brill v Lante Corp.*,⁷⁹ the company president's dinner time description of the breasts of a nearby female diner was dismissed as "misguided."⁸⁰ In *Baskerville*, Judge Posner explained that the perpetrator was not a "sexual harasser," but only "a man whose sense of humor took final shape in adolescence."⁸¹ In *Gross v Burggraf Construction Co.*,⁸² the plaintiff's supervisor stated to a male col-

⁷⁵ Id at 620–21, quoting *Rabidue*, 584 F Supp at 430.

⁷⁶ See *Robinson v Jacksonville Shipyards, Inc.*, 760 F Supp 1486, 1495–98 (M D Fla 1991) (describing pornographic pictures displayed in lockers, offices, and other working areas of defendant's shipyard).

⁷⁷ 584 F Supp at 423.

⁷⁸ 78 F3d at 1168.

⁷⁹ 119 F3d 1266 (7th Cir 1997).

⁸⁰ Id at 1274.

⁸¹ 50 F3d at 431.

⁸² 53 F3d 1531 (10th Cir 1995).

league over the company CB radio, apparently regarding the plaintiff, "Mark, sometimes don't you just want to smash a woman in the face."⁸³ The Tenth Circuit characterized this remark as simply "reflect[ing] a supervisor's frustration at being unable to locate a female employee."⁸⁴

Second, courts continue to insist, as did the judges in *Rabidue*, that there are types of harassing behavior that Title VII was not meant to end. *Gleason* approved of such an exemption because "vulgar banter, tinged with sexual innuendo is inevitable in the modern workplace, particularly from coarse and boorish workers."⁸⁵ The Fifth Circuit holds that Title VII does not apply to "everyday insults," or to the type of harassment which "does not hinder a female employee's performance."⁸⁶

The Ninth Circuit decision in *Ellison v Brady*,⁸⁷ on the other hand, embraced the view that the purpose of Title VII was indeed to change the practices, and ultimately the attitudes, of male workers disposed to sexual harassment:

Congress did not enact Title VII to codify prevailing sexist prejudices. To the contrary, "Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women." . . . We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.⁸⁸

In his dissent in *Rabidue*, Judge Keith also disagreed with Judge Krupansky's suggestion that Congress never intended to alter male practices. He wrote that "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act."⁸⁹

Not every post-*Harris* opinion articulates specific preconceptions about men and women. But in the final analysis, judges

⁸³ Id at 1542 (internal quotation marks omitted).

⁸⁴ Id.

⁸⁵ 118 F3d at 1144 (citation and internal quotation marks omitted).

⁸⁶ *Weller v Citation Oil & Gas Corp*, 84 F3d 191, 194 (5th Cir 1996).

⁸⁷ 924 F2d 872 (9th Cir 1991).

⁸⁸ Id at 881, quoting *Andrews v City of Philadelphia*, 895 F2d 1469, 1483 (3d Cir 1990).

⁸⁹ 805 F2d at 626 (Keith dissenting).

necessarily evaluate a hostile environment case by drawing on their understandings of or beliefs about the interrelationships between women and men. To a woman who would strongly object to a supervisor who attempts to look down her dress or who feigns sexual arousal when he sees her, many post-*Harris* decisions would seem inexplicably callous. The same decisions, however, are far more intelligible if one assumes that the authors share the worldview so clearly articulated in 1986 in *Rabidue*.

II. THE ROLE OF JURIES IN SEXUAL HARASSMENT CASES

The practical significance of judicial attitudes towards and assumptions about sexual harassment depends in large measure on what role judges, rather than juries, play in deciding these cases. The Civil Rights Act of 1991 ("1991 Act")⁹⁰ created a right to trial by jury in intentional discrimination cases; the legislative history of that statute makes clear that Congress was especially concerned to authorize jury trials in sex discrimination cases. Despite the 1991 Act, many appellate judges treat the determination as to the existence of a hostile work environment as if it were a question of law.

A. The Role of Juries Under the Civil Rights Act of 1991.

At the time when *Rabidue* was decided, juries played no role in Title VII cases. Prior to 1991 the only monetary relief available in Title VII cases was back pay, and the lower courts had unanimously concluded that back pay was an equitable remedy. The method for trying Title VII cases underwent a sea change in 1991, when the law was amended to authorize awards of compensatory and punitive damages, and to provide — in addition to whatever the Seventh Amendment might require — a statutory right to trial by jury when plaintiffs sought those remedies. Providing such awards and jury trials to sexual harassment plaintiffs was one of the central purposes of the 1991 Act.

In the highly partisan legislative history of the 1991 Act, the proposal to provide for jury trials in intentional discrimination cases was one of the most bitterly debated issues. Proponents of the provision for compensatory and punitive damages believed that back pay was an ineffective remedy for sexual harassment,⁹¹ and that it was inequitable to deny to Title VII plaintiffs reme-

⁹⁰ Pub L No 102-66, 105 Stat 1072 (1991), codified at 42 USC § 1981a (1994).

⁹¹ *Landgraf v USI Film Products*, 511 US 244, 254 (1994).

dies that were available under section 1981. From the beginning, the drafts passed by the House and Senate also included a right to a jury trial for plaintiffs seeking such damages.

Although employers and congressional opponents quickly conceded that more monetary relief should be provided under Title VII, they fiercely, but ultimately unsuccessfully, resisted jury trials. Congress was divided for more than a year as opponents of the jury trial provision proposed a series of amendments that would have replaced damages and jury trials with "equitable monetary awards," to be made by and at the discretion⁹² of district judges.⁹³ These amendments were repeatedly rejected on the floors of both houses.

The critical distinction between these unsuccessful amendments and the language repeatedly adopted by the House and Senate, and ultimately agreed to by the President, was whether judges or juries would award the additional monetary relief which both sides agreed was needed. The proposed substitute measures all contained language overturning the decision in *Patterson v McLean Credit Union*.⁹⁴ The practical effect of that language, as members of both houses repeatedly noted, was to authorize jury trials and compensatory and punitive damages for a plaintiff seeking relief under Section 1981 for employment discrimination on the basis of race. Thus the core issue that divided Congress in 1990-1991 was whether victims of sex discrimination should also receive the kind of jury trials provided for victims of racial discrimination.

The opponents of the 1991 Act objected repeatedly to the proposal to permit juries to decide Title VII intent cases.⁹⁵ Their cen-

⁹² Supporters of the legislation objected to giving judges discretion to deny relief. See 136 Cong Rec S 16564 (Oct 24, 1990) (remarks of Sen Kennedy) ("[The White House bill] would give courts vast discretion to deny any meaningful remedy to victims of even the most offensive types of sexual and religious discrimination on the job."); 137 Cong Rec H 3860 (June 4, 1991) (remarks of Rep Hughes). Under the substitute submitted by Robert Michel, the presence of egregious conduct was one of the factors a judge could have considered in determining whether to award additional monetary relief.

⁹³ 136 Cong Rec S 9839 (July 17, 1990) (Kassebaum substitute); 137 Cong Rec H 3897 (June 4, 1991) (Michel substitute); Civil Rights Act of 1990: Message From the President of the United States Transmitting Alternative Language to S 2104, HR Doc No 251, 101st Cong, 2d Sess § 8 at 7-9 (1991) (legislation submitted by President Bush).

⁹⁴ 491 US 164, 184 (1989) (holding that racial harassment affecting the conditions of employment was not actionable under § 1981).

⁹⁵ 136 Cong Rec S 16584 (Oct 24, 1990) (remarks of Sen Helms) (objecting to "unlimited jury trials"); 136 Cong Rec H 6773 (Aug 2, 1990) (remarks of Rep Sensenbrenner) ("Because this is a jury trial system, we turn unlawful employment activities into torts, and the entire tort law system, with all of the warts . . . end [sic] up going into the workplace."); 136 Cong Rec H 6775 (Aug 2, 1990) (remarks of Rep LaFalce) ("my biggest problem . . . [is] giving plaintiffs an absolute right to demand a jury trial upon an allegation of

tral complaint was that juries were more likely than judges to find intentional discrimination. Critics cited a study that purported to show that juries had ruled in favor of employees in a large percentage of state employment cases.⁹⁶ Representative Hyde declared, "I would like some way to avoid the jury verdicts because that is what terrorizes the employer."⁹⁷ Representative Stenholm complained that employers should not be subject to the risk of litigation about their employment decisions because they could not be confident that they could "convince a jury that those decisions were [sic] justified," warning that some firms would close rather than run the risk of a jury trial of discrimination claims.⁹⁸ Senator Hatch said a system of jury trials would be "stacked in . . . favor" of civil rights plaintiffs,⁹⁹ and Senator Thurmond endorsed a statement by a prominent business group claiming that juries would disregard "the legal instructions provided by the judge" regarding punitive damages.¹⁰⁰ Opponents repeatedly argued that if jury trials were permitted, employers would (for some reason) start using employment quotas.¹⁰¹ Representative DeLay denounced the proposal for jury-imposed damages as "vicious and vindictive."¹⁰²

Jury trial supporters did not deny that juries might well decide cases differently than judges; the long and ultimately successful fight for jury trials was premised on just that conviction. As was true at the time of the adoption of the Seventh Amendment, "Those who favored juries believed that a jury would reach

intentional discrimination"); 136 Cong Rec H 6798 (Aug 2, 1990) (remarks of Rep Bartlett); 136 Cong Rec H 6811 (Aug 2, 1990) (remarks of Rep Sensenbrenner); 136 Cong Rec H 9991 (Oct 17, 1990) (remarks of Rep Stenholm); 137 Cong Rec S 15468 (Oct 30, 1991) (remarks of Sen Symms); 137 Cong Rec H 3874 (June 4, 1991) (remarks of Rep Dornan); 137 Cong Rec H 3901 (June 4, 1991) (remarks of Rep McCollum); 137 Cong Rec H 3930 (June 5, 1991) (remarks of Rep Hyde); 137 Cong Rec H 3932 (June 5, 1991) (remarks of Rep Goodling); 137 Cong Rec H 9536 (Nov 7, 1991) (remarks of Rep Sensenbrenner).

⁹⁶ 136 Cong Rec S 9341 (July 10, 1990) (remarks of Sen Thurmond); 136 Cong Rec H 6787 (Aug 2, 1990) (remarks of Rep Ballenger).

⁹⁷ 136 Cong Rec H 9403 (Oct 11, 1990).

⁹⁸ 136 Cong Rec H 9991 (Oct 17, 1990).

⁹⁹ 136 Cong Rec S 16566 (Oct 24, 1990).

¹⁰⁰ 136 Cong Rec S 9341 (July 10, 1990) (statement submitted by the United States Chamber of Commerce).

¹⁰¹ 136 Cong Rec H 9402-03 (Oct 11, 1990) (remarks of Rep Hyde); 137 Cong Rec H 3860 (June 4, 1991) (remarks of Rep Holloway); 137 Cong Rec H 3864 (June 4, 1991) (remarks of Rep Hyde); 137 Cong Rec H 3885 (June 4, 1991) (remarks of Rep Gunderson); 137 Cong Rec H 3885 (June 4, 1991) (remarks of Rep Gunderson); 137 Cong Rec H 3894 (June 4, 1991) (remarks of Rep Hyde); 137 Cong Rec H 3941-42 (June 5, 1991) (remarks of Rep Gunderson).

¹⁰² 136 Cong Rec H 6789 (Aug 2, 1990).

a result that a judge either could not or would not reach."¹⁰³ But supporters insisted that the juries would nonetheless be fair. Opponents argued that juries would be arbitrary and unpredictable¹⁰⁴ and expressed doubts as to their competence to decide liability issues.¹⁰⁵ In response, jury trial supporters asserted that critics of that proposal "seem to have little faith in the intelligence and common sense of jurors."¹⁰⁶ Representative Collins contended that opposition to the legislation

shows a fear of the American people. Why do I say this? Because damages are decided by juries. And juries are American. Are we afraid that the same people who entered a voting booth and elected us to our office can't be trusted to enter a jury room and make a decision on punitive damages?¹⁰⁷

Supporters of the legislation offered detailed rebuttals to a number of the attacks on civil juries. In reply to assertions that juries were likely to make outlandishly large awards,¹⁰⁸ the sponsors proffered studies showing that jury awards in past discrimination cases generally had been modest.¹⁰⁹ Responding to claims that the availability of jury trials would lead to a flood of litigation,¹¹⁰ they noted that no such problem had existed under Section 1981.¹¹¹ Significantly, however, no supporter ever rose to dispute assertions that juries might rule in favor of discrimination plaintiffs where judges would not, or to express the hope that that would not occur.

¹⁰³ *Parkland Hosiery Co, Inc v Shore*, 439 US 322, 344 (1979) (Rehnquist dissenting).

¹⁰⁴ 136 Cong Rec S 9340 (July 10, 1990) (statement submitted by the United States Chamber of Commerce) (arguing that jury trials will be a "high-stakes lottery"); 136 Cong Rec S 9897 (July 18, 1990) (remarks of Sen Gorton) (arguing that plaintiffs will sue in hopes of winning a "jackpot"); 136 Cong Rec H 6791 (Aug 2, 1990) (arguing that plaintiffs will "gamble for huge awards").

¹⁰⁵ 136 Cong Rec H 9989 (Oct 17, 1990) (remarks of Rep Fawell).

¹⁰⁶ 136 Cong Rec H 6800 (Aug 2, 1990) (remarks of Rep Vento).

¹⁰⁷ 137 Cong Rec H 3859 (June 4, 1991) (remarks of Rep Collins); see also 137 Cong Rec H 3949 (June 5, 1991) (remarks of Rep Collins).

¹⁰⁸ See, for example, 136 Cong Rec S 9341 (July 10, 1990) (statement submitted by US Chamber of Commerce); 136 Cong Rec S 15331 (Oct 16, 1990) (remarks of Sen Hatch); 136 Cong Rec H 6787 (Aug 2, 1990) (remarks of Rep Ballenger); 136 Cong Rec H 6802 (Aug 2, 1990) (remarks of Rep Shumway).

¹⁰⁹ 136 Cong Rec S 9908 (July 18, 1990) (remarks of Sen Kennedy); 136 Cong Rec H 6812 (Aug 2, 1990) (remarks of Rep Edwards); 136 Cong Rec H 9982 (Oct 17, 1990) (remarks of Rep Henry).

¹¹⁰ See, for example, 136 Cong Rec S 16580 (Oct 24, 1990) (remarks of Sen Burns).

¹¹¹ 136 Cong Rec H 6790 (Aug 2, 1990) (remarks of Rep Slattery); 136 Cong Rec H 6800 (Aug 2, 1990) (remarks of Rep Vento).

Because very few women or minorities have been appointed to the federal judiciary since 1980, jury trial proponents were well aware that if judges, rather than juries, decided sex discrimination cases, the vast majority of those decisions would be made by men and men alone.¹¹² On the other hand, federal law¹¹³ as well as the Constitution, assured that a civil jury would include men and women with a wide range of experiences and perspectives. Congress could sensibly conclude that a jury, composed of individuals with diverse backgrounds, would bring an invaluable understanding of workplace realities, of the nuances of race and gender relations, and of the complexities of human motivation.

B. The Role of Juries in Post-*Harris* Litigation.

Because *Harris* involved pre-1991 harassment, it was tried by a magistrate whose decision was then endorsed by the district judge. By the mid-1990s, however, the cases reaching the appellate courts generally involved harassment which had occurred after the effective date of the 1991 amendments to Title VII. In these cases, a party appealing a decision after trial was generally attacking a jury verdict, and an appeal following the grant of summary judgment required an assessment of whether the dispute should have been heard by a jury. This new procedure led the federal courts to take very different approaches to harassment complaints. As the Third Circuit recently noted,¹¹⁴ there is a clear division among the circuits as to whether the existence *vel non* of a hostile environment is a question of law, a question of fact, or something in between. In the Second and Eighth Circuits, strongly worded opinions insist that this is a factual issue and that juries properly have the central role in its resolution; the

¹¹² In 1988, a year before it began work on what would become the 1991 Civil Rights Act, the Senate Judiciary Committee held a hearing devoted specifically to the small number of women and minorities who had been appointed to the federal bench since 1980. See *The Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench*, Hearings Before The Senate Committee on the Judiciary, 100th Cong, 2d Sess (1988). The hearing was prompted in particular by the fact that in the 1980s, at a time when the number of women attorneys was growing dramatically, the proportion of women on the federal judiciary was actually declining; in 1987-88, 94.6 percent of all judicial nominees were men. *Id* at 3. From 1981 to 1988 all of the 14 new judges in the District of Columbia circuit were white men. *Id* at 42. One witness argued pointedly, "It is unseemly that all, or nearly all sex and race discrimination claims in a given court should be heard by white male judges." *Id* at 144 (statement of Estelle H. Rogers).

¹¹³ 28 USC §§ 1861, 1863 (1994).

¹¹⁴ *Konstantopoulos v Westvaco Corp*, 112 F3d 710, 716 n 1 (3d Cir 1997).

First, Third and Eleventh Circuits follow this approach. On the other hand, the Fourth, Sixth, Seventh and Ninth Circuits generally treat these issues as matters for de novo consideration by appellate judges. There are conflicting approaches to this problem within the Fifth¹¹⁵ and Tenth¹¹⁶ Circuits.

The leading Eighth Circuit decision, *Hathaway v Runyon*,¹¹⁷ holds that because *Harris* refuses to provide mechanical rules, courts ought to defer to juries, whose verdicts should almost always be upheld:

Justice Scalia pointed out in his concurring opinion that since Congress set no clear standard defining a hostile environment, it must be left to "virtually unguided juries" to decide whether particular conduct is "egregious enough" to merit an award of damages. . . . There is no bright line between sexual harassment and merely unpleasant conduct so a jury's decision must generally stand unless there is trial error.¹¹⁸

Other Eighth Circuit decisions rely on *Hathaway* to conclude "whether the conduct rose to the level of abuse is largely in the hands of the jury."¹¹⁹ Some cases have stressed that the jury has

¹¹⁵ Compare *DeAngelis v El Paso Municipal Police Officers Assn*, 51 F3d 591, 592 (5th Cir 1995) ("In reviewing a jury verdict, we . . . consider the evidence in the light most favorable to the party defending the verdict, and we will reverse only when reasonable minds in the exercise of impartial judgment could not have arrived at that verdict."), with *Williamson v Houston*, 148 F3d 462, 468 (5th Cir 1998) ("Post-trial motions for judgment as a matter of law are reviewed in the light most favorable to the jury's determinations. Only when 'the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [people] could not arrive at a contrary verdict' is granting judgment as a matter of law proper.") (citation omitted) (alteration in original).

¹¹⁶ Compare *Davis v United States Postal Service*, 142 F3d 1334, 1341 (10th Cir 1998) (finding judgment as a matter of law for defendant improper so long as the plaintiff shows that a "rational jury could find" an employer failed to remedy a hostile environment), and *Winsor v Hinckley Dodge, Inc.*, 79 F3d 996, 999 (10th Cir 1996) (stating that a district court's findings following a bench trial are to be upheld unless clearly erroneous), with *Bolden v PRC Inc.*, 43 F3d 545, 552 (10th Cir 1994) ("We cannot infer racial animus under the facts of this case.") (emphasis added). The decision in *Smith v Norwest Financial Acceptance, Inc.*, 129 F3d 1408 (10th Cir 1997), appears to treat some hostile environment issues as legal and some as factual. See *id.* at 1413-15 (reviewing de novo the objective test of a hostile workplace, and reviewing deferentially the sufficiency of the evidence establishing the pervasiveness of harassment).

¹¹⁷ 132 F3d 1214 (8th Cir 1997).

¹¹⁸ *Id.* at 1221, quoting *Harris*, 510 US at 24 (Scalia concurring).

¹¹⁹ *Howard v Burns Brothers, Inc.*, 149 F3d 835, 840 (8th Cir 1998). See also *Bailey v Runyon*, 167 F3d 466, 469 (8th Cir 1999), quoting *Howard* and *Hathaway*; *Breeding v Arthur J. Gallagher & Co.*, 164 F3d 1151, 1159 (8th Cir 1999), quoting *Howard*.

such a preeminent role because of the "fact-intensive" nature of the determination of whether a work environment is hostile."¹²⁰

The Second Circuit in *Gallagher v Delaney*¹²¹ advanced a different reason for giving juries the central role in resolving sexual harassment cases. It explained that juries were in fact more competent than judges to adjudicate these controversies:

A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. . . . [A] jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment. . . . Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.¹²²

A later Second Circuit decision relied on *Gallagher* to hold that summary judgment will often be inappropriate in sexual harassment cases.¹²³

Although explanations such as these are not widespread, there are numerous appellate decisions that leave the resolution of harassment claims largely to juries. The questions left for jury resolution include not only the ultimate issue of whether there was a hostile environment,¹²⁴ but also a large number of subsidi-

¹²⁰ *Bales v Wal-Mart Stores, Inc.*, 143 F3d 1103, 1109 (8th Cir 1998), quoting *Crist v Focus Homes, Inc.*, 122 F3d 1107, 1111 (8th Cir 1997).

¹²¹ 139 F3d 338 (2d Cir 1998).

¹²² *Id.* at 342.

¹²³ *Distasio v Perkin Elmer Corp.*, 157 F3d 55, 61 (2d Cir 1998) ("Summary judgment should be used sparingly when as is often the case in sexual harassment claims, state of mind or intent are at issue.") (citation and internal quotation marks omitted); but see *Brown v Coach Stores, Inc.*, 163 F3d 706, 713 (2d Cir 1998):

Brown also argues that she was subjected to a hostile work environment at Coach. . . . The complaint does contend that one Coach supervisor made, on occasion, racist remarks and one such comment was directed at Brown. . . . [W]e find the allegations in the complaint lacking. Although the alleged comments are despicable and offensive, they fail to constitute discriminatory behavior that is sufficiently severe or pervasive to cause a hostile environment.

¹²⁴ *Bales v Wal-Mart Stores, Inc.*, 143 F3d at 1106; *Davis v United States Postal Service*, 142 F3d at 1341; *Crist v Focus Homes, Inc.*, 122 F3d at 1111 (8th Cir 1997); *Amirmokri*

ary factual issues: whether the conduct was welcome,¹²⁵ whether the conduct was severe or pervasive,¹²⁶ whether there was a racial or gender motive behind facially neutral harassment,¹²⁷ how to interpret ambiguous actions or remarks,¹²⁸ whether hostile actions were in retaliation for the rejection of the harasser's advances, whether the plaintiff personally perceived the environment as hostile,¹²⁹ whether a reasonable person in her position would have done so,¹³⁰ and whether the harassment affected the victim's job performance.¹³¹

Other circuits take an entirely different approach. These appellate decisions contain numerous judge-made determinations of whether or not — almost always not — a given set of circumstances create a hostile work environment. Most of these appellate opinions squarely decide the issue:

[O]ur finding [is] that the record here does not establish an objectively hostile work environment.¹³²

Taking these incidents together, . . . the atmosphere . . . was not severe enough or pervasive enough to create an

v Baltimore Gas & Electric Co, 60 F3d 1126, 1130–31 (4th Cir 1995); *Phelps v Sears Roebuck & Co*, 1993 US App LEXIS 33587, *8 n 1 (10th Cir) (unpublished disposition).

¹²⁵ *Bales*, 143 F3d at 1108; *Quick v Donaldson Co, Inc*, 90 F3d 1372, 1378 (8th Cir 1996).

¹²⁶ *Mendoza v Borden, Inc*, 158 F3d 1171, 1176 (11th Cir 1998); (severity and pervasiveness); *Bales*, 143 F3d at 1109 (severity and pervasiveness); *Hathaway*, 132 F3d at 1221 (severity and pervasiveness); *Crist*, 122 F3d at 1111 (8th Cir 1997) (severity); *Morrison v Carleton Woolen Mills, Inc*, 108 F3d 429, 438 (1st Cir 1997) (severity and pervasiveness).

¹²⁷ *Mendoza*, 158 F3d at 1176–77; *Hathaway*, 132 F3d at 1222; *Crist*, 122 F3d at 1111; *Morrison*, 108 F3d at 439; *Kimzey v Wal-Mart Stores, Inc*, 107 F3d 568, 574 (8th Cir 1997); *Quick*, 90 F3d at 1379; *Aman v Cort Furniture Rental Corp*, 85 F3d 1074, 1083 (3d Cir 1996).

¹²⁸ *Mendoza*, 158 F3d at 1177 (11th Cir 1998); *Gallagher*, 139 F3d at 347; *Aman*, 85 F3d at 1082–83; *Rodgers v Western-Southern Life Ins Co*, 12 F3d 668, 676 (7th Cir 1993).

¹²⁹ *Crist*, 122 F3d at 1111; *Kimzey*, 107 F3d at 574.

¹³⁰ *Phillips v Taco Bell Corp*, 156 F3d 884, 888 (8th Cir 1998); *Schwapp v Town of Avon*, 118 F3d 106, 112 (2d Cir 1997).

¹³¹ *Mendoza*, 158 F3d at 1176; *Crist*, 122 F3d at 1111.

¹³² *Black v Zaring Homes, Inc*, 104 F3d 822, 827 (6th Cir 1997). See also *Harrison v Metropolitan Govt of Nashville*, 80 F3d 1107, 1117 (6th Cir 1996) (overturning finding of harassment following bench trial and stating “[a]s reprehensible as the incidents of alleged harassment may have been, we do not find that they constituted an unreasonably abusive environment.”); *Harrington v Boyssville of Michigan, Inc*, 1998 US App LEXIS 9796, *14 (6th Cir) (unpublished disposition) (stating that “the comments did not create a hostile work environment”).

objectively hostile work environment. We reach this conclusion by looking "at all the circumstances."¹³³

[Incidents complained of] were not so frequent, pervasive or pointedly insulting . . . as to create an objectively hostile working environment.¹³⁴

In deciding whether the harassment . . . was sufficiently severe or pervasive to bring it within Title VII's purview, we must examine the totality of the circumstances. . . . [W]e are convinced that the conduct of which [the plaintiff] complains was neither sufficiently severe nor sufficiently pervasive to create an environment that a reasonable man would find hostile or abusive.¹³⁵

[W]e conclude, based on our own examination of the record, that [the plaintiff] was not subjected to a hostile or abusive working environment.¹³⁶

¹³³ *Cowan v Prudential Ins Co*, 141 F3d 751, 757 (7th Cir 1998) (citation omitted); see also *Gleason v Mesirrow Financial, Inc.*, 118 F3d 1134, 1145 (7th Cir 1997) ("[W]e are not persuaded that [the perpetrator's] alleged conduct, objectively speaking, rose to the level of actionable sexual harassment."); *Koelsch v Beltone Electronics Corp.*, 46 F3d 705, 708 (7th Cir 1995) ("The crude conduct [plaintiff] alleges is simply not severe or pervasive enough to render hers a hostile work environment."); *Fernando v Rush-Presbyterian-St. Lukes Medical Center*, 1998 US App LEXIS 6530, *7 (7th Cir) (unpublished disposition) (district court properly granted summary judgment based on lower court's "finding that the incidents were too few in number, too infrequent, and too innocuous to create a hostile work environment."); *Ngeunjuntr v Metropolitan Life Ins Co*, 146 F3d 464, 467 (7th Cir 1998) (even on plaintiff's view of the facts "we would have to conclude that the evidence presented does not reveal an environment sufficiently hostile that a reasonable person would find it abusive").

¹³⁴ *DeAngelis v El Paso Municipal Police Officers Assn.*, 51 F3d 591, 597 (5th Cir 1995) (overturning jury verdict).

¹³⁵ *Hopkins v Baltimore Gas & Electric Co.*, 77 F3d 745, 753 (4th Cir 1996) (same sex harassment); id at 754 ("[W]e hold in this case that as a matter of law the conduct . . . does not create a sufficiently hostile environment on which to rest a Title VII claim."). See also *Hosey v McDonald's Corp.*, 1997 US App LEXIS 10713, *3 (4th Cir) (unpublished disposition) ("We agree with the district court's conclusion [in granting summary judgment to the employer] that the facts as alleged by [plaintiff] were not sufficiently severe or pervasive to create an abusive working environment."); *Bonner v Payless Shoe Source*, 1998 US App LEXIS 7438, *6 (4th Cir) (unpublished disposition) ("In order to determine whether the conduct alleged by [plaintiff] was sufficiently severe or pervasive to bring it within Title VII's purview, we must examine the totality of the circumstances") (emphasis added); id ("[T]he conduct [plaintiff] alleges was not severe or pervasive enough to support his claim that he worked in an objectively hostile work environment.").

¹³⁶ *Konstantopoulos v Westvaco Corp.*, 112 F3d 710, 716 (3d Cir 1997).

We hold that these incidents were not sufficiently offensive or pervasive to constitute a hostile work environment.¹³⁷

[W]e hold that the instances of which plaintiff complains were not sufficiently pervasive or severe to alter the conditions of plaintiff's employment.¹³⁸

Some decisions uphold summary judgment for the defendant on the ground that the appellate court is unable to find that a hostile environment has indeed been created:

[Plaintiff] has failed to show under the totality of the circumstances that the harassing conduct was "so severe or pervasive that it create[d] an abusive working environment."¹³⁹

[W]e conclude that neither of the [plaintiffs] established an inference that they were subjected to a hostile work environment because of their race.¹⁴⁰

[W]e cannot hold that the frequency or severity of the comments rose to the level of "unreasonably interfer[ing]" with [plaintiffs] working environment.¹⁴¹

¹³⁷ *Williams v Goelitz Candy Co*, 1997 US App LEXIS 33570, *7 (9th Cir) (unpublished disposition); see also *Smith v Oakland Scavenger Co*, 1997 US App LEXIS 28737, *13 (9th Cir) (unpublished disposition) ("These two episodes are not 'sufficiently severe or persuasive [sic] to alter the conditions of the victim's employment and create an abusive working environment.'" (citation omitted)).

¹³⁸ *Houck v City of Prairie Village*, 1998 US App LEXIS 30651, *8 (10th Cir) (unpublished disposition). See also *Howard v Beech Aircraft Corp*, 1995 US App LEXIS 14692, *7 (10th Cir) (unpublished disposition) (agreeing with the district court's analysis, which granted summary judgment because "the court cannot find that the plaintiff was subjected to a pervasively hostile work environment") (emphasis added); *Sprague v Thorn Americas, Inc*, 129 F3d 1355, 1366 (10th Cir 1997) (stating that "our review of the remarks alleged by [plaintiff] leads us to conclude that these remarks . . . [did not] create an actionable hostile work environment," and thus affirming summary judgment for the defendant).

¹³⁹ *Callanan v Runyon*, 75 F3d 1293, 1296 (8th Cir 1996) (affirming grant of summary judgment) (alteration in original), quoting *Burns v McGregor Electronic Industries, Inc*, 955 F3d 559, 564 (8th Cir 1992).

¹⁴⁰ *Drake v Minnesota Mining & Manufacturing Co*, 134 F3d 878, 884 (7th Cir 1998).

¹⁴¹ *McKenzie v Illinois Dept of Transportation*, 92 F3d 473, 480 (7th Cir 1996), quoting *Harris*, 510 US at 23.

In all of these opinions the courts proceed on the assumption that a determination regarding the presence or absence of such a hostile environment is to be made by appellate judges.

There is relatively little discussion of why these judges think that that determination should or could be made by an appellate court rather than by a trier of fact. The Ninth Circuit holds that the issue is simply a question of law: "whether the conduct [] was sufficiently severe and pervasive to constitute sexual harassment is a question of law reviewed de novo."¹⁴² More recently the Sixth Circuit has held that "[w]hether misconduct rises to the level of a hostile work environment is a legal question."¹⁴³ Why this would be a question of law, however, is left unexplained.¹⁴⁴ A later Sixth Circuit decision describes the leading decision in that circuit, *Black v Zaring Homes, Inc.*,¹⁴⁵ as having held "that the defendant's verbal conduct was not objectively hostile or abusive as a matter of law."¹⁴⁶ The Fourth Circuit decision in *Hartsell v Duplex Products, Inc.*,¹⁴⁷ insists that once a plaintiff's allegations are known, "there are no questions of fact."¹⁴⁸ This can fairly be understood as an assertion that the analytic process which builds upon those

¹⁴² *Fuller v City of Oakland*, 47 F3d 1522, 1527 (9th Cir 1995) (reversing decision by trial judge in favor of defendant); *Smith*, 1997 US App LEXIS 28737 at *12, quoting *Fuller*; but see *Mullins v Campbell Soup Co*, 1995 US App LEXIS 11918, *12 (9th Cir) (unpublished disposition) (reversing summary judgment in favor of employer because "[t]here is a genuine factual dispute as to whether a reasonable woman in [plaintiff's] position would find her supervisor's conduct 'sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment'"), quoting *Ellison v Brady*, 924 F2d 872, 879 (9th Cir 1991).

¹⁴³ *Stacy v Shoney's, Inc.*, 1998 US App LEXIS 6659, *8 (6th Cir) (unpublished disposition).

¹⁴⁴ The *Stacy* court cites a district court opinion that notes the reluctance of courts to grant summary judgment due to "the fact-specific nature of the inquiry into the merits of hostile environment sexual harassment claims." *Blankenship v Parke Care Center, Inc.*, 913 F Supp 1045, 1051 (S D Ohio 1995), cited in *Stacy*, 1998 US App LEXIS 6659 at *9. Nonetheless, the *Blankenship* court found the issue of the level of conduct required for an actionable workplace environment to be "a legal question . . . appropriate for disposition on summary judgment." 913 F Supp at 1051.

¹⁴⁵ 104 F3d 822 (6th Cir 1997).

¹⁴⁶ *Abeita v Transamerica Mailings, Inc.*, 159 F3d 246, 251 (6th Cir 1998). However, in sustaining the decision of a district judge, following a bench trial, that no hostile work environment had been proven, the Sixth Circuit used the "clear error" standard usually reserved for decisions of fact. *Hixson v Norfolk Southern Railway Co*, 1996 US App LEXIS 15421, *9-10 (6th Cir) (unpublished disposition). Similarly, in reviewing a trial judge's refusal to order a new trial after a jury returned a verdict for an employer, the Sixth Circuit was deferential to both the jury and the trial judge. *Minor v Ford Motor Co*, 1998 US App LEXIS 30007, *7-8 (6th Cir) (unpublished disposition).

¹⁴⁷ 123 F3d 766 (4th Cir 1997).

¹⁴⁸ *Id* at 773 n 6. See *id* at 772 ("[T]he [] allegations fail, as a matter of law. . . . The events . . . are simply insufficient to satisfy the requirement 'that the harassment was sufficiently severe or pervasive to create an abusive working environment.'" (citation omitted).

subsidiary facts is some sort of legal conclusion, rather than the sort of judgmental inference that a jury makes when it determines, for example, whether a product is unreasonably dangerous or a defendant's actions were negligent. On the other hand, a separate line of Fourth Circuit decisions insists that whether "harassment is sufficiently severe or pervasive is quintessentially a question of fact."¹⁴⁹

The leading Seventh Circuit decision in *Baskerville v Culligan International Co.*,¹⁵⁰ insists that whether a given set of circumstances amounts to a hostile environment is often so clear as to be within the province of a judge, but indicates that in a close case the decision should be left to the jury.¹⁵¹ The *Baskerville* approach is all the more unusual because under that decision judges, not juries, in the first instance distinguish between an environment which is "unpleasant" and one which is "hostile," hardly words with any legally established meaning.¹⁵²

One particularly distinct judicial methodology has developed out of *Baskerville*. The Court of Appeals in that case reviewed the ten different types of harassing behavior alleged, and concluded

¹⁴⁹ *Webb v Baxter Healthcare Corp.*, 1995 US App LEXIS 14534, *14 (4th Cir) (unpublished disposition), quoting *Beardsley v Webb*, 30 F3d 524, 530 (4th Cir 1994), quoting *Paroline v Unisys Corp.*, 879 F2d 100, 105 (4th Cir 1989). The district court in *Webb v Baxter* had granted summary judgment, explaining:

What we have got here is, I think, the classic, not so much hostile work environment, as perhaps obnoxious work environment. I don't think there is any question from this record that Mr. Harris would not be a pleasant supervisor. He's got a true locker-room sense of humor. It was not in good taste.

1995 US App LEXIS 14534 at *15. The court of appeals astutely commented, "This passage sounds more like a finding of fact than a ruling that a reasonable jury could make only one finding of fact." *Id.*

¹⁵⁰ 50 F3d 428 (7th Cir 1995).

¹⁵¹ *Id.* at 431.

It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other; and when it is uncertain on which side the defendant's conduct lies, the jury's verdict, whether for or against the defendant, cannot be set aside in the absence of trial error.

In later Seventh Circuit decisions the jury's role in this line-drawing seems to disappear. See, for example, *Cowan*, 141 F3d at 759. On the other hand, in reviewing a judge's decision, following a bench trial, that no hostile environment existed, the Seventh Circuit has deferred to the findings of the trial judge, applying a "clear error" standard. *King v MCI Telecommunications Corp.*, 1998 US App LEXIS 9379, *4 (7th Cir) (unpublished disposition).

¹⁵² See *Brill v Lante Corp.*, 119 F3d 1266, 1275 (7th Cir 1997) ("[T]he incidents described . . . were not sufficiently severe or pervasive to amount to sexual harassment under the law of this circuit.") (Eschbach concurring) (emphasis added).

that even in combination they were insufficient to establish a hostile environment.¹⁵³ Later decisions in the Seventh and Sixth Circuits respectively have used *Baskerville* and the similar Sixth Circuit decision in *Black v Zaring Homes, Inc.*,¹⁵⁴ as a legal "yardstick" against which to measure the facts of subsequent complaints.¹⁵⁵ Other instances of harassment are deemed, as a matter of law, not to create a hostile work environment if the abuses are not more frequent or more severe than the incidents in *Baskerville* or *Black*.¹⁵⁶

Several appellate decisions also resolve subsidiary issues related to harassment claims. Although the judgments involved are intensely fact-specific, the courts treat them as suitable for de novo, if not nisi prius, resolution by an appellate court. Thus, in *DeAngelis v El Paso Municipal Police Officers Association*,¹⁵⁷ the Fifth Circuit overturned a jury verdict for the plaintiff, holding that a series of derogatory columns printed in her union newspaper did not "evinced sufficient hostility toward her as a matter of law."¹⁵⁸ In *Gleason*, the court affirmed summary judgment for the defendant in part because it "reject[ed] Gleason's claim that she subjectively experienced a sexually hostile work environment."¹⁵⁹ The Court of Appeals in *Koelsch v Beltone Electronics Corp.*,¹⁶⁰ after describing the abuse complained of, ruled "we do not find that these incidents poisoned the workplace."¹⁶¹ In addition, appellate panels regularly decide whether particular facially neutral con-

¹⁵³ 50 F3d at 430-31.

¹⁵⁴ 104 F3d 822 (6th Cir 1997). *Black* compares the facts of that case with those of *Baskerville*. Id at 826-27 and n 4.

¹⁵⁵ *Gleason v Mesirov Financial, Inc.*, 118 F3d at 1144-46:

The trial judge in the case before us properly used *Baskerville* as a yardstick for determining whether Novak's conduct amounted to actionable sexual harassment, and we agree with his conclusion that Novak's alleged actions were 'actually less egregious than those reported in *Baskerville*.'

[N]either of Novak's alleged remarks approach the level of offensiveness displayed by the alleged harasser in *Baskerville*.

[T]he incidents . . . do not rise to the level of actionable sexual harassment, as defined in our case law.

¹⁵⁶ *Harrington*, 1998 US App LEXIS 9796 at *14-15 (comparing facts with those in *Black*); *Skouby v Prudential Ins Co*, 130 F3d 794, 797 (7th Cir 1997) (comparing facts to those of *Baskerville*).

¹⁵⁷ 51 F3d 591 (5th Cir 1996).

¹⁵⁸ Id at 596.

¹⁵⁹ 118 F3d at 1145.

¹⁶⁰ 46 F3d 705 (7th Cir 1995).

¹⁶¹ Id at 708.

duct had an illicit motivation,¹⁶² whether harassment interfered with job performance,¹⁶³ and whether the harassment could be characterized as "severe" or "pervasive."¹⁶⁴

III. COGNIZABLE INCIDENTS OF SEXUAL HARASSMENT

Judge Krupansky's opinion in *Rabidue v Osceola Refining Co*¹⁶⁵ summarized the holding as concluding that the evidence in the case did not result in an environment "that could be considered intimidating, hostile, or offensive under 29 C.F.R. § 1604.11(a)(3) as elaborated upon by this court."¹⁶⁶ A key footnote to this passage set out a specific methodology for analyzing whether a pattern of sexual harassment was legal or not under Title VII. After describing the facts of several prior cases in which the plaintiff had prevailed, Judge Krupansky explained that the incidents about which Rabidue had complained were different in kind from the types of harassing actions in those cases:

In the case at bar, the charges of sexually hostile and abusive environment were limited to pictorial calendar type office wall displays of semi-nude and nude females and Henry's off-color language. Unlike the facts of *Bundy*,¹⁶⁷ *Henson*,¹⁶⁸ and *Katz*,¹⁶⁹ this case involved no sexual propositions, offensive touchings, or sexual conduct of a similar nature.¹⁷⁰

The clear implication of this passage was that only certain kinds of sexually harassing incidents could be relied upon to establish an actionable hostile environment. Offensive touchings or explicit sexual propositions, if present in sufficient number, could add up to a hostile environment, but obnoxious language and sexually explicit pictures could not, no matter how severe or pervasive. One Fourth Circuit decision applying *Rabidue* indicated

¹⁶² See Part IV.

¹⁶³ See text accompanying notes 363-76.

¹⁶⁴ See Part V.

¹⁶⁵ 805 F2d 611 (6th Cir 1986).

¹⁶⁶ Id at 622 (emphasis added).

¹⁶⁷ *Bundy v Jackson*, 641 F2d 934 (DC Cir 1981).

¹⁶⁸ *Henson v City of Dundee*, 682 F2d 897 (11th Cir 1982).

¹⁶⁹ *Katz v Dole*, 709 F2d 251 (4th Cir 1983).

¹⁷⁰ 805 F2d at 622 n 7.

that harassing actions which were no more than "offensive" were inherently insufficient to support a Title VII claim.¹⁷¹

The decision in *Harris v Forklift Systems, Inc.*,¹⁷² should have put an end to this approach. The plaintiff in *Harris* had not alleged any sexual propositions or unwelcome physical contact; the jokes and innuendos of the harasser in *Harris* were mild stuff compared to the harasser's behavior described in *Rabidue*. Yet the Supreme Court had no doubt that it made sense to direct the district court in *Harris* to assess carefully whether the facts of that case met the standard announced in the Court's opinion. The suggestion in *Rabidue*'s footnote seven that only offensive touchings and propositions were cognizable conflicted with the specific statements in *Harris* and *Meritor* that actionable harassment included "ridicule" and "insult."¹⁷³ *Harris* admonished that the facts of *Meritor* could not be taken as "mark[ing] the boundary of what is actionable," but that these facts represented an "especially egregious example[]."¹⁷⁴ This explanation rejected precisely the sort of approach that the Sixth Circuit had used in footnote seven of *Rabidue*.

More broadly, *Harris* made clear that the cognizable incidents from which a hostile environment case was to be construed were "discriminatory conduct."¹⁷⁵ *Meritor* had made the same point, explaining that "a plaintiff may establish a violation of Title VII by proving that *discrimination* based on sex has created a hostile or abusive work environment."¹⁷⁶ In *Harris*, the Court reiterated the passage in *Meritor* that established that Title VII strikes at "the entire spectrum of disparate treatment of men and women,"¹⁷⁷ not merely that part of the spectrum involving explicit sexual propositions or unwanted touching, or any other limited portion. The Supreme Court's decision in *Oncale v Sundowner Offshore Services, Inc.*,¹⁷⁸ was consistent with statements in *Meritor* that Title VII was violated by discriminatory conduct which created an "offensive" environment.¹⁷⁹ In *Oncale*, the Court ex-

¹⁷¹ *Bowes v American Tobacco Co*, 1991 US App LEXIS 3892, *6 (4th Cir) (unpublished disposition).

¹⁷² 510 US 17 (1993).

¹⁷³ *Harris*, 510 US at 21; *Meritor Savings Bank, FSB v Vinson*, 477 US at 64, 67 (1986) (noting epithets).

¹⁷⁴ 510 US at 22.

¹⁷⁵ *Id* at 23.

¹⁷⁶ 477 US at 66 (emphasis added).

¹⁷⁷ 510 US at 17, quoting *Meritor*, 477 US at 64, quoting *Los Angeles Dept of Water & Power v Manhart*, 435 US 702, 707 n 13 (1978).

¹⁷⁸ 523 US 75 (1998).

¹⁷⁹ See *Meritor*, 477 US at 66, 67.

plained that a sexual harassment plaintiff could prevail by establishing evidence of "behavior so objectively *offensive* as to alter the 'conditions' of the victim's employment."¹⁸⁰

After *Harris*, the issue that has most sharply divided the lower courts is whether, as Judge Krupansky first suggested in *Rabidue*, certain types of harassment are immune from consideration or attack under Title VII because they are less extreme than the practices condemned in *Meritor*. Five circuits have rejected such an approach, holding instead that *any* discriminatory act of harassment can contribute to a hostile work environment. In the Third Circuit, a cognizable incident need only be "discrimination" and "detrimental[]"; "an employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct."¹⁸¹ In the Eleventh Circuit, the plaintiff must show simply that the incidents were "unwelcome" and "based on sex."¹⁸² The Eighth Circuit has approved of a jury instruction that the plaintiff need only show any practice of "discrimination because of her sex by the intentional conduct of her fellow employees consisting of unwelcome sexually motivated conduct or other unwelcome conduct which was directed at [her] because she is female."¹⁸³ In the Federal Circuit, "any harassment or other unequal treatment of an employee . . . that would not occur but for the sex of the employee . . . may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII."¹⁸⁴ The Second Circuit relied on *Harris* in rejecting any suggestion that "employers are free from liability in all but the most egregious of cases."¹⁸⁵

¹⁸⁰ 523 US at 81 (emphasis added).

¹⁸¹ *Spain v Gallegos*, 26 F3d 439, 447 (3d Cir 1994) (citation and internal quotation marks omitted); see also *Knabe v Boury Corp*, 114 F3d 407, 410 (3d Cir 1997); *Aman v Cort Furniture Rental Corp*, 85 F3d 1074, 1081 (3d Cir 1996).

¹⁸² *Mendoza v Borden, Inc*, 158 F3d 1171, 1175 (11th Cir 1998).

¹⁸³ *Hathaway v Runyon*, 132 F3d 1214, 1221 (8th Cir 1997) (alteration in original); see also *Gillming v Simmons Industries*, 91 F3d 1168, 1171 (8th Cir 1996); *Quick v Donaldson Co, Inc*, 90 F3d 1372, 1379 (8th Cir 1996) (evidence must show that "treatment" of employee of one gender was "worse than the treatment" of the other gender).

¹⁸⁴ *King v Hillen*, 21 F3d 1572, 1583 (Fed Cir 1994), quoting *McKinney v Dole*, 765 F2d 1129, 1138 (DC Cir 1985).

¹⁸⁵ *Torres v Pisano*, 116 F3d 625, 631 (2d Cir 1997). In *Gallagher v Delaney*, 139 F3d 338 (2d Cir 1998), the court of appeals cited a pre-*Harris* decision that had "emphatically" rejected a defense argument that a harasser's "conduct, though not a paradigm of modern inter-gender workplace relations, was not pervasive enough to trigger relief, . . . and federal law does not punish 'trivial behavior' consisting of only 'two kisses, three arm strokes,' several degrading epithets and other objectionable — but ultimately harmless — conduct." Id at 347 (alteration in original), quoting *Carrero v New York City Housing Authority*, 890 F2d 569, 578 (2d Cir 1989).

Five other circuits have taken the opposite approach. As the Seventh Circuit candidly explained in *Gleason v Mesirow Financial, Inc.*,¹⁸⁶ and *Galloway v General Motors Service Parts Operations*,¹⁸⁷ the rule in that circuit, followed in practice by the others, recognizes a "safe harbor for employers" for certain types of remarks and actions: "The central teaching of the *Baskerville* opinion [is] that 'low-level harassment' is not actionable."¹⁸⁸ Practices which do not reach the requisite "level of offensiveness"¹⁸⁹ fall within the safe harbor and cannot as a matter of law provide a basis for a Title VII claim. These practices are, legally speaking, harmless, regardless of how often they occur, of whether the employer was well aware of and indifferent to the problem, or, presumably, of whether they are tolerated or even sponsored as a matter of written company policy.

The safe harbor doctrine has two somewhat distinct rationales and, therefore, two somewhat distinct methodologies. The first insists that the Title VII prohibition against sexual harassment concerns, and is limited to, a particular paradigm. The typical elements of that paradigm are "sexual assaults . . . uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures."¹⁹⁰ A sexual harassment claim that is "far from the paradigmatic case of sexual harassment"¹⁹¹ falls outside the protections of Title VII.

The second somewhat more theoretical approach insists that the law distinguishes between two categories of practices. The first, too mild to give rise to a Title VII claim, is labeled, or more accurately dismissed, as "offensive,"¹⁹² "merely offensive,"¹⁹³ "merely mildly offensive,"¹⁹⁴ "vulgarity,"¹⁹⁵ "merely vulgar,"¹⁹⁶

¹⁸⁶ 118 F3d 1134 (7th Cir 1997).

¹⁸⁷ 78 F3d 1164 (7th Cir 1996).

¹⁸⁸ *Gleason*, 118 F3d at 1144.

¹⁸⁹ *Id* at 1145; see also *Galloway*, 78 F3d at 1168 (hostile environment claim cannot be grounded on "alleged harassing conduct [that] is too tepid").

¹⁹⁰ *Baskerville v Culligan Intl Co*, 50 F3d 428, 430 (7th Cir 1995); see also *Brill v Lante Corp*, 119 F3d 1266, 1274 (7th Cir 1997).

¹⁹¹ *Hartsell v Duplex Products, Inc*, 123 F2d 766, 773 (4th Cir 1997).

¹⁹² *Shepherd v Comptroller of Public Accounts*, 168 F3d 871 (5th Cir 1999).

¹⁹³ *Harrington v Boysville of Michigan, Inc*, 1998 US App LEXIS 9796, *14 (6th Cir) (unpublished disposition); *Bermudez v TRC Holdings, Inc*, 138 F3d 1176, 1181 (7th Cir 1998); *Black v Zaring Homes, Inc*, 104 F3d 822, 826 (6th Cir 1997); *Walker v Social Health Assn of Greater Cincinnati, Inc*, 1995 US App LEXIS 38830, *5 (6th Cir) (unpublished disposition); *Thomas v Shoney's, Inc*, 1995 US App LEXIS 16456, *5 (4th Cir) (unpublished disposition).

¹⁹⁴ *Baskerville*, 50 F3d at 431, quoting *Carr v Allison Gas Turbine Division*, 32 F3d 1007, 1010 (7th Cir 1994).

¹⁹⁵ *Hopkins v Baltimore Gas & Electric Co*, 77 F3d 745, 753 (4th Cir 1996), quoting *Baskerville*, 50 F3d at 430.

"tasteless,"¹⁹⁷ "distasteful,"¹⁹⁸ "insensitive,"¹⁹⁹ or "inappropriate."²⁰⁰ This category includes "vulgar banter, tinged with sexual innuendo, of coarse or boorish workers."²⁰¹ Such harassment, however pervasive, is never actionable because "Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace,"²⁰² but only "the kind of male attentions that can make the workplace hellish for women."²⁰³

The second type of conduct which can support a hostile environment claim is "deeply offensive,"²⁰⁴ "deeply repugnant,"²⁰⁵ "deeply disturbing,"²⁰⁶ "intimidating,"²⁰⁷ "physically threatening,"²⁰⁸ "humiliating,"²⁰⁹ or "degrading."²¹⁰ On this view, "offensive" conduct by men is precisely the sort of problem that Title VII was never intended to end and that women simply have to put up with; mildly offensive conduct, Judge Posner maintains, is not really "harassment" at all under Title VII.²¹¹

The courts that insist that a Title VII harassment claim cannot be founded on verbal abuse or other merely "offensive" actions often cite *Harris*. In that case, the Supreme Court explained that its standard "takes a middle ground between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."²¹² *Meritor* had explained that in order to show "an offensive work environment,"²¹³ the plaintiff had to prove more than "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an

¹⁹⁶ *Baskerville*, 50 F3d at 431; *Gleason*, 118 F3d at 1144; *Carr*, 32 F3d at 1010.

¹⁹⁷ *Hopkins*, 77 F3d at 753.

¹⁹⁸ *Baskerville*, 50 F3d at 431.

¹⁹⁹ *Bermudez*, 138 F3d at 1181; see also *Hartsell*, 123 F3d at 773.

²⁰⁰ *Black*, 104 F3d at 826.

²⁰¹ *Baskerville*, 50 F3d at 430; see also *Hartsell*, 123 F3d at 772 ("Title VII does not attempt 'to purge the workplace of vulgarity.'"), quoting *Baskerville*, 50 F3d at 430; *Sprague v Thorn Americas, Inc.*, 129 F3d 1355, 1366 (10th Cir 1997) (remarks not actionable because merely "unpleasant and boorish").

²⁰² *Hartsell*, 123 F3d at 773, quoting *Hopkins*, 77 F3d at 754.

²⁰³ *Id.*, quoting *Baskerville*, 50 F3d at 430.

²⁰⁴ *Baskerville*, 50 F3d at 431, quoting *Carr*, 32 F3d at 1010; *Gleason*, 118 F3d at 1144, quoting *Carr*, 32 F3d at 1010.

²⁰⁵ *Baskerville*, 50 F3d at 431.

²⁰⁶ *Id.*

²⁰⁷ *Carr*, 32 F3d at 1009.

²⁰⁸ *Crawford*, 96 F3d at 836.

²⁰⁹ *Id.*

²¹⁰ *Carr*, 32 F3d at 1009.

²¹¹ *Baskerville*, 50 F3d at 430-31.

²¹² 510 US at 21.

²¹³ 477 US at 66.

employee."²¹⁴ This line of post *Harris* cases converts the *Harris* and *Meritor* rule that one offensive utterance does not create a hostile environment into a doctrine that merely "offensive" utterances, no matter how numerous, cannot create such an environment. Thus in *Bermudez v TRC Holdings, Inc.*,²¹⁵ the district court asserted that "*Harris* rejects the option of treating as discriminatory 'any conduct that is merely offensive.'"²¹⁶ This is correct in the sense that *Harris* held that one offensive action does not create a hostile environment, but inaccurate insofar as it implies that *Harris* held that offensive conduct can never create such an environment. *Black v Zaring Homes, Inc.*,²¹⁷ and *Saxton v American Telephone & Telegraph Co.*,²¹⁸ quote the words "merely offensive" from this passage in *Harris* without any mention of how the Supreme Court used that phrase.²¹⁹

A dispute about whether "offensive" conduct can form the basis of a Title VII hostile environment reflects the underlying division among the lower courts about the safe harbor doctrine. A dozen decisions insist that offensive conduct is precisely what Title VII does not forbid;²²⁰ a comparable number of cases hold the opposite.²²¹ A similar dispute exists about whether "vulgar"²²² or "coarse"²²³ remarks can form the basis of a hostile environment claim.

These differences in standards predictably lead to inconsistent treatment of similar practices. Thus in the Seventh Circuit it is not sufficiently objectionable that a supervisor remarked that

²¹⁴ Id at 67 (emphasis added), quoting *Rogers v EEOC*, 454 F2d 234, 238 (5th Cir 1971).

²¹⁵ 138 F3d 1176 (7th Cir 1998).

²¹⁶ Id at 1181, quoting *Harris*, 510 US at 21.

²¹⁷ 104 F3d 822 (6th Cir 1997).

²¹⁸ 10 F3d 526 (7th Cir 1993).

²¹⁹ *Black*, 104 F3d at 826; *Saxton*, 10 F3d at 535.

²²⁰ See cases cited in notes 192-94.

²²¹ *Davis v United States Postal Service*, 142 F3d 1334, 1341 (10th Cir 1998); *Torres v Pisano*, 116 F3d 625, 633 n 7 (2d Cir 1997), citing *Andrews v City of Philadelphia*, 895 F2d 1469, 1486 (3d Cir 1990); *Hirase-Doi v U.S. West Communications, Inc.*, 61 F3d 777, 781 (10th Cir 1995); *Doe v R.R. Donnelley & Sons Co.*, 42 F3d 439, 444 (7th Cir 1994); *Dey v Colt Construction & Development Co.*, 28 F3d 1446, 1455 (7th Cir 1994); *King v Hillen*, 21 F3d 1572, 1583 (Fed Cir 1994) ("The criterion is not what a reasonable woman employee is capable of enduring, but whether the offensive acts alter the conditions of employment."). Note that the decision in *Baskerville* declaring "offensive" conduct insufficient to support a hostile environment claim disregarded two prior Seventh Circuit decisions to the contrary.

²²² Compare cases cited in notes 195-96 with *DeAngelis v El Paso Municipal Police Officers Assn.*, 51 F3d 591, 595 (5th Cir 1995) (finding no hostile work environment where a newsletter column "did not represent . . . a campaign of vulgarity perpetrated by co-workers") and *Morrison v Carleton Woolen Mills, Inc.*, 108 F3d 429, 439 (1st Cir 1997).

²²³ Compare *Baskerville*, 50 F3d at 430, with *Reed v A.W. Lawrence & Co, Inc.*, 95 F3d 1170, 1179 (2d Cir 1996).

his office was "hot" once the plaintiff entered.²²⁴ Meanwhile in the Eleventh Circuit a plaintiff can base a harassment claim, in part, on a supervisor's assertion that he got "fired up" when she entered his office.²²⁵ Disagreements exist about whether specific types of conduct or verbal abuse are covered by Title VII at all: insults,²²⁶ lewd gestures,²²⁷ staring or ogling,²²⁸ guttural noises,²²⁹ following the plaintiff,²³⁰ screaming at the plaintiff,²³¹ use of the word "bitch,"²³² kicking,²³³ and expressing anger in sexist language.²³⁴

²²⁴ *Baskerville*, 50 F3d at 430.

²²⁵ *Mendoza*, 158 F3d at 1175.

²²⁶ Compare *Crawford*, 96 F3d at 833 (finding references to the part of the office with older workers as "the dumb side" or "the worthless side" insufficient to support age harassment claim), and *Gleason*, 118 F3d at 1144-45 (finding merely "inappropriate" repeated references to female customers of brokerage as "dumb"), with *Morrison*, 108 F3d at 434 (1st Cir 1997) (finding that allegedly gender based statement to plaintiff that she was "dumb" would support a sex harassment claim; claim also supported by statement to plaintiff that "her place was in the kitchen"); *Kimzey v Wal-Mart Stores, Inc.*, 107 F3d 568, 571 (8th Cir 1997) (finding that repeated references by perpetrator to plaintiff as "damn dummy" and "idiot" support harassment claim). The harassment claim in *Harris* relied significantly on non-sexual insults. 510 US at 19.

²²⁷ Compare *Baskerville*, 50 F3d at 430 (gesture indicating masturbation insufficient to support sexual harassment claim), with *Davis*, 142 F3d at 1337 (evidence that perpetrator made a "sexually obscene" gesture at plaintiff supported sexual harassment claim).

²²⁸ Compare *Penry v Federal Home Loan Bank of Topeka*, 155 F3d 1257, 1260, 1263 (10th Cir 1998) (despite having made explicitly sexual remarks, actions of perpetrators in repeatedly staring at plaintiff and "repeatedly tr[ying] to look down her blouse" dismissed as "gender-neutral antics"), and *Gleason*, 118 F3d at 1144-45 (dismissing "ogling" as merely "inappropriate"), with *King*, 21 F3d at 1574 (sexual harassment claim supported by evidence that perpetrator "looked at [complainant's] body in a sexually suggestive manner").

²²⁹ See notes 1-2 and accompanying text.

²³⁰ Compare *Penry*, 155 F3d at 1260, 1263 (despite other explicitly sexual remarks, dismissing act of perpetrator in "following [plaintiff] constantly when she got up to go to the breakroom or the bathroom" as "gender-neutral antics"), with *Mendoza*, 158 F3d at 1175 (11th Cir 1998) (finding perpetrator's action in following plaintiff sufficient to support sexual harassment claim).

²³¹ Compare *Brill v Lante Corp.*, 119 F3d 1266, 1274 (7th Cir 1997) (holding "yelling at [plaintiff] while 'towering' over her" insufficient to support a sexual harassment claim), with *Morrison*, 108 F3d at 434 (holding that regularly screaming at female employees, "but not at the men," contributed to a hostile work environment).

²³² Compare *Galloway*, 78 F3d at 1168 (finding incessant use of the epithet "sick bitch" not sufficient without more to support sexual harassment claim), and *Gleason*, 118 F3d at 1145 (finding reference to female customers as "bitchy" merely "inappropriate"), with *Morrison* 108 F3d at 434 (finding that use of the term does support sexual harassment claim), and *Kimzey*, 107 F3d at 571 (same), and *Phelps v Sears Roebuck & Co.*, 1993 US App LEXIS 33587, *10 (10th Cir) (unpublished disposition) (same).

²³³ Compare *Hartsell*, 123 F3d at 769, 773 (holding that kicking and shoving plaintiff's chair were too trivial to support a harassment claim), with *Kimzey*, 107 F3d at 571 (holding that evidence that harasser kicked legs of female employees and shook ladder on which plaintiff was standing would support a harassment claim).

²³⁴ Compare *Gross v Burggraf Construction Co.*, 53 F3d 1531, 1542 (10th Cir 1995) ("sometimes don't you just want to smash a woman in the face" dismissed as merely reflecting "a supervisor's frustration at being unable to locate a female employee"), with

In the safe harbor circuits, incidents such as the following were deemed too mild to support a hostile environment claim:

Making a "grunting sound" when plaintiff wore a leather skirt.²³⁵

Referring at meeting to a plot of land as "Titsville," "Twin Peaks," and "Hootersville."²³⁶

Frequent in-office references to a local strip club and the exploits there of male workers, and circulation of photograph of one male worker with one of the strippers.²³⁷

References to women as "bloodsuckers," "leeches" and "dizzy broads."²³⁸

Announcing to plaintiff when she began work, "We've made every female in this office cry like a baby. We will do the same to you. Just give us time. We will find your weakness."²³⁹

Directing at plaintiff sexual references, such as inquiry as to whether one male worker was "eating her"; sending plaintiff a drawing "of a body which had been slit [and] a match representing an erect penis was attached."²⁴⁰

Looking down the plaintiff's dress, explaining "well, you got to get it when you can."²⁴¹

Winsor v Hinckley Dodge, Inc., 79 F3d 996, 1000 (10th Cir 1996) (finding that use of gender specific epithets to express anger constitutes actionable harassment even if underlying anger is not gender based).

²³⁵ *Baskerville*, 50 F3d at 430.

²³⁶ *Black*, 104 F3d at 823-24.

²³⁷ *Cowan*, 141 F3d at 756.

²³⁸ *Id.*

²³⁹ *Hartsell*, 123 F3d at 768.

²⁴⁰ *Skouby v Prudential Insurance Co.*, 130 F3d 794, 796 (7th Cir 1997).

²⁴¹ *Sprague v Thorn Americas, Inc.*, 129 F3d 1355, 1366 (10th Cir 1997).

Repeatedly attempting to look down the plaintiff's dress, and remarking "your elbows are the same color as your nipples."²⁴²

Conversely, in the circuits more faithful to *Harris*, practices that are comparable to or milder than these have supported such a claim:

Frequent gifts, compliments and lunch invitations, but no off-color remarks.²⁴³

Referring to female physician by her first name only while referring to male physicians with the title "Doctor" and their last names; asking a female physician why she did not go into nursing or get married rather than becoming a doctor; referring to plaintiff as a "babe" and suggesting she go into modeling rather than medicine.²⁴⁴

IV. HARASSMENT THAT IS NON-SEXUAL

The plaintiff in *Rabidue v Osceola Refining Co.*,²⁴⁵ alleged that, in addition to the expressly sexual harassment, she had been continually mistreated on account of her gender in a number of facially neutral ways. She asserted that she had been denied the perquisites accorded to other managers, such as free lunches and entertainment privileges, and that she was forbidden to take male customers to lunch, undermined when she issued orders, and directed to sit with the secretaries at a meeting.²⁴⁶ There was direct evidence that some of these incidents were based on Rabidue's sex.²⁴⁷ In his dissenting opinion in *Rabidue*, Judge Keith suggested that the defendant's history of tolerating sexual harassment and misogyny tended to support the plaintiff's claims that these facially neutral practices stemmed from a discrimina-

²⁴² *Shepherd*, 168 F3d at 872.

²⁴³ *Gallagher v Delaney*, 139 F3d 338, 343-44 (2d Cir 1998).

²⁴⁴ *Smith v Saint Louis University*, 109 F3d 1261, 1262-63 (8th Cir 1997).

²⁴⁵ 805 F2d 611 (6th Cir 1985).

²⁴⁶ *Id.* at 624 (Keith dissenting).

²⁴⁷ For example, Rabidue's supervisor stated that the company needed a man in her job, since the plaintiff "can't take customers out to lunch." *Id.* Another supervisor explained to Rabidue that she could not do so because it would appear improper "for a woman to take male customers to lunch." *Id.* But as the dissenting judge noted, "defendant apparently saw no problem in male managers entertaining female clients regardless of marital status." *Id.*

tory motive.²⁴⁸ The district judge in *Rabidue*, however, summarily dismissed plaintiff's Equal Pay Act claim alleging all these incidents on the ground that they involved fringe benefits;²⁴⁹ in the Sixth Circuit Judge Krupansky simply ignored them altogether.²⁵⁰

Under the paradigm rationale of the safe harbor doctrine, gender-neutral harassment would seem to have no particular relevance to a hostile environment claim. A number of decisions appear to proceed on just that premise, largely ignoring this type of claim and evidence just as Judge Krupansky did in *Rabidue*, or expressly dismissing such evidence precisely because it is facially sex-neutral.²⁵¹ Other circuits correctly insist that harassment of a non-sexual nature can support a basis for a hostile environment claim.²⁵²

²⁴⁸ Id at 625.

²⁴⁹ *Rabidue v Osceola Refining Co*, 584 F Supp 419, 436 (E D Mich 1984).

²⁵⁰ Although recognizing that plaintiff was legitimately "annoyed" at Henry and numerous other male workers for making crude remarks or posting sexually explicit posters in work areas, Krupansky criticized *Rabidue* for her failure to "work harmoniously with co-workers." 805 F2d at 615. It appears never to have occurred to him or Judge Newblatt that the misconduct of the male workers might have led in whole or part to the conflicts between them and *Rabidue*.

²⁵¹ See, for example, *Morrison v Carleton Woolen Mills, Inc*, 108 F3d 429, 441 (1st Cir 1997) (in order for harassing conduct to support sexual harassment claim "the overtones of such behavior must be, at the very least, sex-based, so as to be a recognizable form of sex discrimination"); *Provencher v CVS Pharmacy, Division of Melville Corp*, 145 F3d 5, 16 (1st Cir 1998) (same); *Harrison v Metropolitan Government of Nashville*, 80 F3d 1107, 1113, 1115-17 (6th Cir 1996) (ignoring findings of racially discriminatory discipline and training in holding there was no hostile environment and that certain harassment incidents had no racial connotation); *Johnson v City of Fort Wayne*, 91 F3d 922, 938 (7th Cir 1996) (upholding award of summary judgment dismissing hostile environment claim while remanding for trial of claims of discrimination in exclusion from meetings and of unlawful demotion: "Mr. Johnson does not allege that he was subjected to racial slurs, epithets, or other overtly race-related conduct in the workplace. His allegations of harassment do not fit neatly into the traditional analysis of a hostile work environment claim"); *Gebbers v Commercial Data Center, Inc*, 1995 US App LEXIS 614, *9 (6th Cir) (unpublished disposition) (finding alleged retaliatory job assignment and denial of assistance at work irrelevant to hostile environment claim because the practices were "sex neutral"); *Moyo v Gomez*, 1998 US App LEXIS 26207, *3 (9th Cir) (unpublished disposition) (affirming dismissal of racial harassment case because the harassment was not "verbal or physical conduct of a [racial] nature") (alteration in original).

²⁵² See, for example, *Phelps v Sears Roebuck & Co*, 1993 US App LEXIS 33587, *9-10 (10th Cir) (unpublished disposition); *Van Steenburgh v Rival Co*, 171 F3d 1155, 1159 (8th Cir 1999) ("Rival is mistaken in asserting that there must be incidents . . . that are explicitly sexual."); *Hathaway v Runyon*, 132 F3d 1214, 1222 (8th Cir 1997) (jury could infer that gender-neutral menacing behavior was result of gender related motive and therefore supported harassment claim); *Kopp v Samaritan Health System, Inc*, 13 F3d 264, 269 (8th Cir 1993) ("The predicate acts which support a hostile-environment sexual-harassment claim need not be explicitly sexual in nature"; claim could be grounded in part in gender-neutral physical threats if motive proved); *McKinney v Dole*, 765 F2d 1129, 1138 (DC Cir 1985) (holding that a hostile environment claim can be based on physical assault: "We have never held that sexual harassment or other unequal treatment of an employee . . .

Yet a third line of decisions acknowledges that facially neutral harassment would be relevant if directed at a victim because of her sex, but then summarily dismisses just such claims as groundless.²⁵³ Viewing these claims in isolation, a trier-of-fact would determine the motive behind such an incident using the methodology set out in *McDonnell Douglas Corp v Green*,²⁵⁴ and its progeny. But in most sexual harassment cases, the same people who engaged in the gender-neutral actions also made gender-specific remarks about the plaintiff or about other women. Ordinarily, the trier of fact could of course regard these gender-specific remarks as evidence of gender-based motives or animus that might well explain the gender-neutral acts. A number of lower courts have properly insisted that evidence of those remarks supports the inference that the other actions were improperly motivated. Thus these courts require a trial on the merits regarding the gender-neutral acts.²⁵⁵ But in the safe harbor circuits, appellate judges — in the teeth of avowedly sexist remarks by the perpetrators — insist that the plaintiff cannot rely on the gender-neutral harassment because there is “no evidence” it was related to her sex.²⁵⁶

that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now.”); *Stacks v Southwestern Bell Yellow Pages, Inc*, 27 F3d 1316, 1326 (8th Cir 1994) (holding that a hostile environment claim can be supported by evidence of discriminatory discipline); *Spain v Gallegos*, 26 F3d 439, 447 (3d Cir 1994) (holding that a hostile environment claim can be based on actions which “are not sexual by their very nature”), quoting *Andrews v City of Philadelphia*, 895 F2d 1469, 1482 n 3 (3d Cir 1990); *Trujillo v University of Colorado Health Sciences Center*, 157 F3d 1211, 1215 (10th Cir 1998) (racial harassment).

²⁵³ See *Penry v Federal Home Loan Bank of Topeka*, 155 F3d 1257, 1263 (10th Cir 1998) (affirming award of summary judgment and summarily dismissing 200 paragraphs of detailed factual allegations of harassment on the ground that the behavior “seems motivated by poor taste and a lack of professionalism rather than by the plaintiffs’ gender”).

²⁵⁴ 411 US 792 (1973).

²⁵⁵ See *Van Steenburgh*, 171 F3d at 159 (holding that a jury could infer a “nexus” between a supervisor’s “hostile manner” and plaintiff’s rejection of his sexual advances); *Mendoza v Borden, Inc*, 158 F3d 1171, 1175–76 (11th Cir 1998) (holding that plaintiff’s claim that staring was part of sexual harassment is supported by a prior incident in which same individual stared at plaintiff’s groin area while making a sniffing sound); *Aman v Cort Furniture Rental Corp*, 85 F3d 1074, 1083 (3d Cir 1996) (holding that in light of racist remarks by company officials who had allegedly harassed the plaintiff, a jury could find that facially neutral harassment was “part of a complex tapestry of discrimination”).

²⁵⁶ *Hardin v S.C. Johnson & Son, Inc*, 167 F3d 340, 346, 345 (7th Cir 1999) (holding that “nothing suggests [race and gender neutral acts] were motivated by discrimination,” notwithstanding evidence that the harasser referred to plaintiff and other black women as “stupid black bitches,” “black cunts,” and “stupid niggers”); *Drake v Minnesota Mining & Manufacturing Co*, 134 F3d 878, 881, 885–86 (7th Cir 1998) (affirming summary judgment on ground that there was no evidence that harassment of white plaintiff was due to his association with and support of black workers, even though the record was “replete with evidence that some of the employees . . . were racial bigots,”); *Hartsell v Duplex Products*,

In a similar vein, a number of lower court decisions hold that a sexual harassment plaintiff cannot base her claim on abuse that was directed at her for spurning the advances of the perpetrator,²⁵⁷ or for having complained about his conduct. Such misconduct, they reason, is retaliation, not sexual harassment, and so it must be considered separately.²⁵⁸ These limitations are even

Inc., 123 F3d 766, 773 (4th Cir 1997) (holding summary judgment appropriate because plaintiff cannot show that most alleged harassment, which was gender neutral, was the result of an impermissible motive; however, harassers had told plaintiff they intended to drive her to tears, as they had "every female in this office," and admonished her to "go home and fetch [her] husband's slippers like a good little wife") (alteration in original); *Crawford v Medina General Hospital*, 96 F3d 830, 836 (6th Cir 1996) (affirming summary judgment because of a lack of evidence that repeated insulting remarks were based on plaintiff's age, although perpetrator had allegedly asserted "I don't think women over 55 should be working" and "[o]ld people should be seen and not heard"); *Gross v Burggraf Construction Co.*, 53 F3d 1531, 1542-46 (10th Cir 1995) (holding that plaintiff failed to offer evidence that a variety of gender neutral practices were the result of an impermissible practice, even though perpetrator had admittedly once remarked about plaintiff, "sometimes don't you just want to smash a woman in the face"); *Bolden v PRC Inc.*, 43 F3d 545, 551 (10th Cir 1994) (affirming summary judgment because of lack of evidence that ridicule and insults were racially motivated despite fact that perpetrator had often used the term "nigger"); *Walk v Rubbermaid Inc.*, 1996 US App LEXIS 5494, *6 (6th Cir) (unpublished disposition) (affirming summary judgment because plaintiff "failed to show" that "foul and abusive language" directed at her was "based on her sex," despite the fact that the harasser had repeatedly referred to plaintiff and other female workers as "menopausal bitches").

²⁵⁷ In *Galloway v General Motors Service Parts Operations*, 78 F3d 1164 (7th Cir 1996), the plaintiff was the target of a protracted campaign of harassment directed at her by a fellow worker after she ended a romantic relation with him. The perpetrator did not treat any men in that manner. The Court of Appeals held that the plaintiff could not "rationally consider herself at a disadvantage in relation to her male co-workers by virtue of being a woman." *Id.* at 1168. Rather, Judge Posner explained, the harassment was merely the result of "personal animosity arising out of the failed relationship." *Id.* The fact that that relationship was based on the plaintiff's gender was somehow irrelevant to whether the harassment which followed was itself related to gender. On Judge Posner's view, the harassment was no more gender related than if it had arisen out of a failed business deal.

The Eighth Circuit took the opposite approach in *Van Steenburgh*. In that case, the Court of Appeals upheld a sexual harassment claim based on gender neutral abuse which, the court noted, a jury could find arose out of the plaintiff's "repeated rejections of [the perpetrator's] prior sexual overtures." 171 F3d at 1159.

²⁵⁸ In *McKenzie v Illinois Dept of Transportation*, 92 F3d 473 (7th Cir 1996), the plaintiff was subjected to gender neutral harassment after she complained about earlier sexual harassment. The Court of Appeals held that the plaintiff's EEOC charge was inadequate to raise any claims about the gender-neutral harassment, in part because she had not checked the box for "retaliation" on the form. *Id.* at 481. In *Morrison*, a jury found that the plaintiff had been the subject of sexual harassment during a period after November 21, 1991. 108 F3d at 432. Prior to that date the plaintiff had been the target of a campaign of expressly sexual harassment, about which she had complained in vain to the company. After that date the overtly sexual harassment ended, but fellow employees circulated a petition supporting the harassers and refused to speak with the plaintiff, and the employer allegedly interfered with her work. *Id.* at 435-36. In overturning the jury verdict, the Court of Appeals held, "If the Company deliberately sought to isolate or punish Morrison for her earlier complaints of harassment, by telling other employees not to speak to her, such conduct might have supported a claim for unlawful retaliation, but not for sexual harassment." *Id.* at 441.

more important where courts apply a very narrow conception of "facially discriminatory actions." In *Howard v Beech Aircraft Corp.*,²⁵⁹ for example, the Tenth Circuit held that a foreman's remark that "the smartest woman at Beech was not as smart as the dumbest man," was "not overtly sexual enough."²⁶⁰

After a court excludes these different sorts of facially-neutral harassment, and then applies the safe harbor doctrine to exclude evidence of gender-specific abuse that is merely "offensive," a harassment victim may be left with no incidents at all on which to base her hostile environment claim. Even where some incidents have survived this process of elimination, lower court case law regarding the frequency of harassment needed to show pervasiveness will often be fatal to the remaining claims.

V. HARASSMENT AS A "CONDITION" OF EMPLOYMENT

In five different opinions, the Supreme Court has held that a Title VII violation can be established by evidence that the harassment was sufficiently "severe or pervasive."²⁶¹ But neither "severity" nor "pervasiveness" are technical terms with any talismanic significance. Rather, both *Harris* and *Meritor* hold that the dispositive issues in a harassment case are (1) whether the "conditions" of employment were altered at all, and (2) whether the resulting condition or environment was hostile or abusive.²⁶² Thus *Meritor* explained that an isolated incident might not "affect[] a 'term, condition, or privilege' of employment within the meaning of Title VII,"²⁶³ and that even when conditions were altered that might not be "to [a] sufficiently significant degree to violate Title VII."²⁶⁴ *Harris* reiterated that there must be a demonstration both that the alleged conduct has "actually [] altered the conditions of

²⁵⁹ 1995 US App LEXIS 14692 (10th Cir) (unpublished disposition).

²⁶⁰ Id at *6, *7. The same supervisor repeatedly commented that the plaintiff had "Martha Lattamore syndrome," which the plaintiff took as a reference to the size of her breasts. Id at *6-7. To an employee who knew Ms. Lattamore the meaning of this remark might have been crystal clear, but for the Tenth Circuit — none of whose members had worked at the office at issue — it was sufficiently opaque to fall outside the scope of Title VII. Obviously this approach encourages harassers to resort to such devices.

²⁶¹ *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 67 (1986); *Harris v Forklift Systems, Inc.*, 510 US 17, 21 (1993); *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 78 (1998); *Burlington Industries, Inc v Ellerth*, 118 S Ct 2257, 2265 (1998); *Faragher v City of Boca Raton*, 118 S Ct 2275, 2283 (1998).

²⁶² In *Quick v Donaldson Co, Inc*, 90 F3d 1372 (8th Cir 1986), the Court of Appeals correctly separated these two elements, noting that the first was whether the alleged harassment was "sufficiently severe or pervasive" to affect [the victim's] conditions of employment." Id at 1379.

²⁶³ 477 US at 67.

²⁶⁴ Id, citing *Rogers v EEOC*, 454 F2d 234, 238 (5th Cir 1971).

the victim's employment" and that it had "sufficiently affect[ed] the conditions of employment to implicate Title VII."²⁶⁵ In *Oncale v Sundowner Offshore Services, Inc.*,²⁶⁶ the Court again explained that one distinct element of a hostile work environment case was proof that the behavior complained of was sufficient "to alter the 'conditions' of the victim's employment."²⁶⁷ These consistent statements provide an intelligible account of *why* the frequency or severity of the incidents would matter.

In order to make sense of the phrase "severe or pervasive" as the Supreme Court used it in *Meritor* and its progeny, one must have some understanding of how severe or pervasive harassment could create a discriminatory environment. In its most literal sense, "environment" refers to a continuous physical presence — for example the level of ozone or particulate constantly in the air. But even in the worst harassment cases, such as the egregious facts of *Meritor*, harassment usually is not literally continual.²⁶⁸ If one analyzed separately each of the 2400 minutes in a forty hour week, the record in *Meritor* would surely have shown that harassment was actually occurring during only a very small portion of those moments.²⁶⁹ What is consistently present in a work "environment" — be it happy, dull, or hostile — is the subjective mental response of the victim, a circumstance which derives directly from the harasser's attitude and actions. A distinct environment arises where a victim concludes that one or more supervisors have engaged in misconduct, not because of an isolated misjudgment, but because — as one employer's general counsel explained with resignation — "Well, that's just the way they are."²⁷⁰ A plaintiff is working in a discriminatory environment when she

²⁶⁵ 510 US at 21–22, 21 (1993).

²⁶⁶ 523 US 75 (1998).

²⁶⁷ *Id.* at 81.

²⁶⁸ In the reported cases there are a few idiosyncratic situations in which the harassment is physically continuous, such as the posters in *Rabidue*. See *Rabidue v Osceola Refining Co.*, 805 F2d 611, 623–24 (6th Cir 1985) (Keith dissenting) (describing nude posters displayed in the workplace).

²⁶⁹ See *Draper v Coeur Rochester, Inc.*, 147 F3d 1104, 1108 n 1 (9th Cir 1998) ("[A] hostile work environment is ambient and persistent, and [] it continues to exist between overt manifestations.").

²⁷⁰ *Black v Zaring Homes, Inc.*, 104 F3d 822, 824 (6th Cir 1997); see also *Breeding v Arthur J. Gallagher & Co.*, 164 F3d 1151, 1155 (8th Cir 1999) (supervisor responded to complaint about harasser by acknowledging, "that is just the way he is"); *Howard v Burns Brothers, Inc.*, 149 F3d 835, 838 (8th Cir 1998) (general manager, in response to complaint about harasser, advised plaintiff, "That's just Keith"); *Varner v National Super Markets, Inc.*, 94 F3d 1209, 1211 (8th Cir 1996) ("That's just Bob being himself"); *Hirase-Doi v U.S. West Communications, Inc.*, 61 F3d 777, 780 (10th Cir 1995) (manager responded to complainant by advising the victim that "she should expect [intimidating stares]" from the perpetrator after the manager had reprimanded him for sexual harassment).

perceives that she is at risk of significant further misconduct.²⁷¹ Thus *Harris* held that a victim's subjective responses — her reluctance to remain at the job — were probative.²⁷²

Three examples support this interpretation of the term "hostile environment." First, if in *Meritor* Ms. Vinson had had a bout of amnesia, it would make no sense to say that she was in a hostile environment the moment she returned to work. Her work environment would become hostile (again) only after she relearned how the harasser in that case was acting. Second, in a typical harassment case (at least absent support, past toleration or knowledge of the harassment by others) the hostile environment ordinarily ends when the harasser is dismissed. It would also end if the harasser inadvertently wandered into the women's studies section of a book store, had a feminist epiphany, repented his past conduct, and convinced the victim that he had changed. But once a harasser shows a disposition to abuse, interruptions in the abuse do not alter the environment, except where they somehow demonstrate that the abuses are not likely to recur.²⁷³ Third, a woman who knows that her boss gropes randomly selected

²⁷¹ In *Dey v Colt Construction & Development Co*, 28 F3d 1446, 1450 (7th Cir 1994), the alleged harasser had assertedly unzipped his pants while alone in an elevator with the victim. The court noted that the incident "would no doubt be even more frightening to a reasonable woman in Dey's position who, prior to that incident, had endured more than two years of verbal harassment." *Id* at 1456. See also *Van Steenburgh v Rival Co*, 171 F3d 1155, 1159 (8th Cir 1999) (although perpetrator's "pattern of harassment involved waiting several months between incidents," plaintiff was "in constant fear of retaliation [and] . . . so frightened that her job performance declined and she became clinically depressed"); *Draper v Coeur Rochester, Inc*, 147 F3d 1104, 1109 (9th Cir 1998) (harassers' hostile act indicated "all that could be expected in the future"); *Hathaway v Runyon*, 132 F3d 1214, 1217, 1222 (8th Cir 1997) (plaintiff "feared that [perpetrator] would fondle her again . . . and was terrified to pass within grabbing range"); *Schwapp v Town of Avon*, 118 F3d 106, 108 (2d Cir 1997) (high ranking official advised minority victim that he "should not expect" fellow white officers to treat him with the respect with which he treated them); *McKenzie v Illinois Dept of Transportation*, 92 F3d 473, 477 (8th Cir 1996) (plaintiff "scared to death" to be alone with [perpetrator]); *King v Hillen*, 21 F3d 1572, 1574 (Fed Cir 1994) (plaintiff "afraid to be alone" with perpetrator).

²⁷² 510 US at 21–22 ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment.").

²⁷³ *Bales v Wal-Mart Stores, Inc*, 143 F3d 1103, 1009 (8th Cir 1998):

[Supervisor's] offensive actions abated only for short periods of time when [plaintiff] would indicate that she was upset with him, and then they would begin anew. To the extent the record shows the dates of the incidents described, it would appear that the frequency of the troublesome conduct waxed and waned and that there were times when Vallejo was more restrained in his conduct than he was at other times. But there was a clear pattern of offensive conversation and behavior.

women is working in a hostile environment; she is entitled to sue before she herself has been victimized.²⁷⁴

Thus in a typical hostile environment case, absent an extraordinary situation like a sexual assault, what distinguishes an "environment" from an "isolated incident" are circumstances that demonstrate to the victim that the harasser has a disposition to engage in abuse. A victim would ordinarily consider the number, frequency, circumstances, and type of incidents in assessing the risk of recurrence. A single off-color joke or unwanted request for a date would not support such an inference, because such an action might represent no more than an isolated error of judgment from someone who ordinarily knew better. On the other hand, a supervisor's unsolicited groping is a sure sign of trouble, because it departs so markedly from normal social behavior.²⁷⁵

Reported cases illustrate a number of different reasons why abusive behavior might recur. First, a harasser may adhere to a view of women (or of a racial minority²⁷⁶) that would predispose him to harassment.²⁷⁷ Second, some aspect of the harasser's char-

²⁷⁴ Intentional discrimination directed at other individuals, including non-employees, can create a hostile environment for an employee of the targeted group. See *Meritor*, 477 US at 66, quoting *Rogers v EEOC*, 454 F2d 234 (5th Cir 1971); *Moyo v Gomez*, 40 F3d 982, 986 (9th Cir 1994).

²⁷⁵ The significance of the content of the action is illustrated by *Webb v Cardiothoracic Surgery Associates*, 139 F3d 532 (5th Cir 1998). The first incident occurred at a bar during a business trip, when the perpetrator, the victim's supervisor, hugged her and asked her to come to his hotel room. Several weeks later, during a meeting in his office, the perpetrator allegedly "placed his hand on her leg and touched the inside of her thigh under her skirt." *Id* at 535. The court of appeals observed:

Even if the [] incident at the bar and hotel . . . was insufficient to put [plaintiff] on notice that her employment might be affected by [the perpetrator's] conduct, when the incident in [his] office occurred only weeks later, [she] was on notice that [his] conduct would affect her employment. . . . The plaintiff needed no additional facts after these two encounters to understand that [her supervisor] was sexually harassing her.

Id at 538.

²⁷⁶ See *Schwapp*, 118 F3d at 108 (high ranking official advised black officer to try to understand the history of the department as "the history of an all white male department and that at one time all the crimes in Avon were committed by blacks and that guys started to stereotype people."); *Harrison v Metropolitan Government of Nashville*, 80 F3d 1107, 1118 (6th Cir 1996) (manager used racial epithets and other abuse to try to run the plaintiff off the job).

²⁷⁷ See *Smith v Norwest Financial Acceptance, Inc.*, 129 F3d 1408, 1414 (10th Cir 1997) (record showed "sexual and racial animus directed toward [p]laintiff"); *Black*, 104 F3d at 825 (harassers had "a grade school level fascination with women's body parts"); *Crawford*, 96 F3d at 832 (supervisor said, "I don't think women over 55 should be working," and "[o]ld people should be seen and not heard") (alteration in original); *Aman*, 85 F3d at 1078 (supervisor said possibly regarding African-Americans, "we're going to have to come up there and get rid of all of you"); *id* at 1083 ("A reasonable jury could find that statements like the ones allegedly made in this case send a clear message . . . that mem-

acter — perhaps a willingness to abuse supervisory power for sexual gain — may dispose him to harassment.²⁷⁸ Third, a harasser's strange or erratic behavior may give rise to a legitimate concern that the harasser is somewhat out of control, and that he may act unpredictably or inappropriately.²⁷⁹ Fourth, the actions of a spurned suitor or harasser may demonstrate that he has a disposition to retaliate against the victim.²⁸⁰ Fifth, where a supervisor has shown animus toward a victim because of her race or to her gender, the victim will thereafter legitimately doubt the fairness of or motives underlying every adverse decision made by that supervisor.²⁸¹ In some situations a perpetrator's known ongoing animus or demeaning view of the plaintiff may by itself constitute a condition of the job that endures long after the particular incident or incidents which may have revealed that hostility.²⁸²

The pervasiveness of harassment — both its regularity and frequency — is important because it indicates to the victim that

bers of a particular race are disfavored.”); *Dey*, 28 F3d at 1457 (“Don’t talk to the broad — girls are only good for one thing.”); *Stacks v Southwestern Bell Yellow Pages, Inc.*, 27 F3d 1316, 1318 (8th Cir 1998) (harasser had stated that “women in sales were the worst thing that had happened to this company” and that “there isn’t a woman alive that can make it with Yellow Pages”).

²⁷⁸ *Phillips v Taco Bell Corp.*, 156 F3d 885, 887 (8th Cir 1998) (“[perpetrator] Dwayne didn’t get it”); *McKenzie*, 92 F3d at 477 (supervisor told victim that harasser was “simply a barroom bully”); *Steiner v Showboat Operating Co.*, 25 F3d 1459, 1463 (9th Cir 1994) (perpetrator remarked “I spoke the same way ever since I have been born”).

²⁷⁹ *Bales*, 143 F3d at 1106–07 (when victim took a day off of work because of a “personal problem” with her then boyfriend, supervisor repeatedly called her at home and threatened to fire her if she did not tell him the details; subsequently he told victim he “was having conversations with her ‘in his head,’” repeatedly mentioned having dreams about her, posed as her boyfriend to get photographs of her from a portrait studio, and allegedly began stalking her); *Gallagher v Delaney*, 139 F3d 339, 343 (2d Cir 1998) (manager told secretary that he had had a dream that she kissed him); *Fuller v City of Oakland*, 47 F3d 1522, 1527–28 (9th Cir 1995) (former paramour made repeated hang-up calls to plaintiff, threatened to kill himself, attempted to run plaintiff off the road, and forced her to give him her unlisted number); *id.* at 1528 (plaintiff “no longer kn[ew] what to expect next from [harasser], and [could] reasonably be concerned that he might do anything at any time”); *Ellison v Brady*, 924 F2d 872, 874 (9th Cir 1991) (after receiving disturbing letter from harasser, victim “didn’t know what he would do next”).

²⁸⁰ *Saxton v American Telephone & Telegraph Co.*, 10 F3d 526, 529 (7th Cir 1993) (after victim spurned supervisor’s advances she “perceived a change in [his] attitude toward her at work. . . . [H]e refused to speak with her, treated her in a condescending manner, and . . . seemed inaccessible.”).

²⁸¹ See, for example, *Rodgers v Western-Southern Life Ins Co.*, 12 F3d 668, 673 (7th Cir 1993) (use of racial epithets by supervisor “encouraged [plaintiff] to view even [supervisor’s] race-neutral decisions as racially-motivated efforts to force [plaintiff’s] resignation”).

²⁸² *Id.* at 675 (six month period between supervisor’s racist remark and victim’s resignation did not “sever the causal connection between the statement and the resignation”).

she remains at risk.²⁸³ Where abuse has happened on several occasions, the victim may sensibly conclude that it is going to recur;²⁸⁴ a second or subsequent act may tell the victim whether the first incident was an isolated lapse of judgment or the result of an underlying attitude. Furthermore, the timing of one or more additional acts indicates the frequency with which recurrence is likely to occur. Harassment need not be frequent to be foreseeable: if a supervisor regularly groped his female subordinates every Valentine's Day, that practice would be a condition of employment as surely as if it were a written policy. Infrequency undermines a claim that harassment is a condition of employment only when the period of time between recurrences is so great and unpredictable that a reasonable victim could not be concerned about repetition. Finally, prior harassment will color the impact of a subsequent act. Later actions may be more harmful both because they confirm the likelihood of regular recurrences and because the victim may be more sensitive as a result of prior abuses.²⁸⁵ Recurrence is often an important part of proving that harassment was a condition, but the presence of that condition should not be confused with the evidence that demonstrates its existence. If a supervisor credibly announced that he would, beginning on January 1 of the next year, grope a named subordinate, groping would become a condition of his or her employment, just as if the employer announced that it would at random intervals dock the pay of workers of Spanish origin to revenge the sinking of the Maine.

²⁸³ See, for example, *Hathaway*, 132 F3d at 1222 ("A work environment is shaped by the accumulation of abusive conduct."); *Galloway v General Motors Service Parts Operations*, 78 F3d 1164, 1166 (7th Cir 1996) (sexual harassment "is often a cumulative process"); *King*, 21 F3d at 1581 ("[I]t is the cumulative effect of the offensive behavior that creates the working environment").

²⁸⁴ As the Fifth Circuit has correctly observed, once the harassment has occurred enough that a recurrence is foreseeable, its irregularity is not fatal to a hostile environment claim. *Butler v Ysleta Independent School District*, 161 F3d 263, 269 (5th Cir 1998) ("[T]he allegedly discriminatory conduct — consisting of occasional [anonymous] letters — was infrequent We do not place undue weight on this factor, however. Even occasional anonymous letters can be frightening, and irregular receipt of such letters may be even more disarming than letters that arrive like clockwork and become an expected nuisance for which the victim may be prepared.").

²⁸⁵ See *Gallagher*, 139 F3d at 347 (holding that acts committed prior to the sexual harassment cause of action "possibly increase[] a victim's "sensitivities"). A number of decisions confuse the greater harm caused by more frequent incidents with the requirement that the plaintiff show that harassment was a condition of the job. See, for example, *Hopkins v Baltimore Gas & Electric Co*, 77 F3d 745, 753 (4th Cir 1996) (stating that intermittent acts of harassment over a seven year period "suggests the absence of a condition sufficiently pervasive to establish Title VII liability").

Conversely, an isolated incident may be insignificant because it is not sufficient to rule out the possibility that the perpetrator was guilty of an atypical, momentary lapse in judgment, or was engaged in a one time effort to learn whether the plaintiff shared his interest in a personal relationship. Even if there is a significant risk of recurrence, a victim may conclude that any recurrence is likely to be so infrequent and mild — one off-color joke at the annual Christmas party, for example — that the problem will not rise to the level of an ongoing concern.

This analysis makes clear the complexity of the fact-specific judgment that a jury must ordinarily make in a hostile environment case. The trier of fact must assess what conclusions a victim drew, and what conclusions she might reasonably have drawn, regarding (a) the likelihood that the harasser would again engage in misconduct, (b) how soon and how frequently that misconduct was likely to occur, (c) how serious the misconduct was likely to be, and (d) the combined significance of these first three factors. Constant harassment, whether mild or severe, would alter the conditions of employment because it would demonstrate that the problem would recur quite regularly. Conversely, a single sexual assault is sufficient because even a small risk of recurrence of such abuse would create a hostile environment.²⁸⁶ In most cases, however, the trier of fact must consider the combined effect of the pervasiveness (as an indicator of the risk of recurrence) and severity (as an indicator of the magnitude of likely harm).

The original *Meritor* formulation — whether the harassment was sufficiently severe or pervasive to alter the conditions of employment and create a hostile or abusive environment — is not some complex legal test, but simply frames a common sense, fact-specific question. It is the same sort of inquiry as “Was the weather sufficiently hot or muggy to alter the conditions and make the vacation uncomfortable.” The Tenth Circuit grasped the fact-specific nature of this issue when it observed:

[W]hile courts have tended to count events over time to determine pervasiveness, the word “pervasive” is not a counting measure. The trier of fact utilizes a broader contextual analysis. It begins with the number, sequence, and timing of the conduct. The fact-finder then looks at the

²⁸⁶ See *Brzonkala v Virginia Polytechnic Institute*, 132 F3d 949, 959 (4th Cir 1997), vacated on other grounds, 169 F3d 820 (4th Cir) (en banc), cert granted as *United States v Morrison*, 120 S Ct 11 (1999).

nuances of an environment that is imposed by each instance of discriminatory behavior.²⁸⁷

Many lower courts however, in an effort to tease out of *Meritor* a number of purely legal issues, have isolated the phrase "severe or pervasive." They have turned the words "severe" and "pervasive" (particularly the word "pervasive") into largely empty vessels whose meanings the courts can fashion or manipulate at will. This process has involved three distinct steps. First, the phrase "severe or pervasive" is simply removed from the formula, so that (like "hot or muggy" in isolation) its meaning no longer turns on what it might show; instead it somehow refers to some concept of severity and pervasiveness in the abstract. Second, the "or" is often assumed to be rigidly disjunctive; thus there are entirely separate and unrelated tests, one for "pervasiveness" and one for "severity." Third, severity then largely drops from the analysis. A harassment claim with no pervasiveness, but only severity, would be a claim that could succeed even though there was only a single incident. Courts have sensibly concluded that only in very unusual cases could a single incident create a hostile work environment; reported decisions to date have typically found this present in a case of sexual assault or the use of the word "nigger."²⁸⁸ These assumptions lead to numerous opinions that hold that pervasiveness, or some similar concept — not pervasiveness that causes a change in the environment but just pervasiveness in some abstract sense — is a distinct and essential element of any hostile work environment case.²⁸⁹

Detached in this way from its original context in *Meritor*, the legal standard of pervasiveness is understandably vague and manipulable. Appellate decisions phrase this standard in a variety of ways. Some cases require that harassment be "regular,"²⁹⁰

²⁸⁷ *Smith*, 129 F3d at 1415.

²⁸⁸ See, for example, *Tomka v Seiler Corp*, 66 F3d 1295, 1305 (2d Cir 1995) ("[E]ven a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment for purposes of Title VII liability."); *Daniels v Essex Group*, 937 F2d 1264, 1274 n 4 (7th Cir 1991) ("If a black worker's colleagues came to work wearing the white hoods and robes of the [Ku Klux] Klan and proceeded to hold a cross-burning on the premises, all with the knowledge of the employer, this single incident would doubtless give rise to the employer's liability for racial harassment under Title VII.");

²⁸⁹ See, for example, *Spain v Gallegos*, 26 F3d 439, 447 (3d Cir 1994) (listing pervasiveness as one of five requirements of a hostile work environment claim), citing *Andrews v Philadelphia*, 895 F2d 1469, 1482 (3d Cir 1990).

²⁹⁰ *Knabe v Boury Corp*, 114 F3d 407, 410 (3d Cir 1997) (stating that harassment must be "pervasive and regular") (emphasis added); *Aman v Cort Furniture Rental Corp*, 85 F3d 1074, 1081 (3d Cir 1996) (same); *Spain*, 26 F3d at 447 (same).

suggesting that the incidents must occur at a fairly consistent pace with only modest separations in time. A second approach demands proof that the harassment be "continuous,"²⁹¹ envisioning essentially incessant mistreatment. A third line of decisions insists on a "steady barrage,"²⁹² implying both that the number of incidents must be large (a barrage not a salvo) and that they must be more or less incessant. One Second Circuit case, for example, demands that the acts of harassment "permeat[e]"²⁹³ the workplace. Another Eighth Circuit decision insists on "a consistent course" of harassment.²⁹⁴

These varying formulations have several important common characteristics. It does not matter what type of harassment is involved, only that it occurs with the requisite consistency or in the required volume. Because these formulations use some concept of pervasiveness as a mechanical test, rather than as a tool for deciding whether the harassment caused something, they are well adapted to serving as a legal standard which judges rather than juries would apply. To return to the weather analogy, whether the weather was sufficiently hot and muggy to spoil a vacation is the sort of factual inquiry appropriate for a jury, but whether it was "hot" could be a matter to be resolved on summary judgment, so long as a court is prepared to create some legal standard — 70 degrees, 80 degrees, 212 degrees, etc. — to define "hot."

Having converted the pervasiveness factor into this sort of abstract legal standard, the courts have been free to manipulate it to determine the outcome of cases. There is simply no intelli-

²⁹¹ *Perry v Ethan Allen, Inc.*, 115 F3d 143, 149 (2d Cir 1997) (citation and internal quotation marks omitted); but see *Hathaway*, 132 F2d at 1222 (plaintiff's "exposure to harassing conduct need not have been continuous in order to have been pervasive"); *Smith v Saint Louis University*, 109 F3d 1261, 1264 (8th Cir 1997) (plaintiff "need not be exposed continually to the harassment to succeed on her claim").

²⁹² *Witt v Roadway Express*, 136 F3d 1424, 1433 (10th Cir 1998) (racial discrimination case), quoting *Bolden v PRC Inc.*, 43 F3d 545, 551 (10th Cir 1994) (same); *Schwapp*, 118 F2d at 110; *Aramburu v Boeing Co.*, 112 F3d 1398, 1410 (10th Cir 1997) (same); *Gross v Burggraf Construction Co.*, 53 F3d 1531, 1539 (10th Cir 1995), quoting *Bolden*, 43 F3d at 551; *Bolden*, 43 F3d at 551; but see *Smith v Norwest Financial Acceptance, Inc.*, 129 F3d at 1414 ("In *Bolden* we held that only two overtly racial comments and one arguably racial remark over the course of [] eight years of employment did not constitute pervasive conduct.").

²⁹³ *Gallagher*, 139 F3d at 347. *Harris* uses this term in one passage. 510 US at 21 (describing a workplace "permeated with discriminatory intimidation, ridicule, and insult") (citation and internal quotation marks omitted).

²⁹⁴ *Callanan v Runyon*, 75 F3d 1293, 1296 (8th Cir 1996); see also *Mullins v Campbell Soup Co.*, 1995 US App LEXIS 11918, *10 (9th Cir) (unpublished disposition) ("plaintiff must show a concerted pattern of harassment of a repeated, routine or generalized nature").

ble standard one could invoke to determine whether "regular" or "continuous" or "steady barrage" means at least one incident a day, a week, or a month. At best this depends on what one regards as an out-of-the ordinary occurrence rate. One might describe one earthquake a month as "regular," but not one cloudy day a month. In *Black v Zaring Homes, Inc.*,²⁹⁵ Judge Kennedy overturned a jury's finding of sexual harassment based on abusive remarks that occurred every two weeks at a regularly scheduled departmental meeting.²⁹⁶ The next year in *Abeita v Trans-america Mailings, Inc.*,²⁹⁷ Judge Kennedy upheld a complaint alleging that essentially similar comments were "commonplace," "ongoing" and "continuing," and explained that the continuity "establishes that the statements were more pervasive or widespread than the ones made in *Black*."²⁹⁸ In *Baskerville*, the plaintiff proved that during her seven months of employment there had been eight discrete incidents, as well as a recurring practice of calling her "pretty girl."²⁹⁹ Judge Posner characterized all these incidents as "infrequen[t]" and "a handful of comments spread over months."³⁰⁰ In *Bolden v PRC, Inc.*,³⁰¹ the Tenth Circuit dismissed twenty incidents in eighteen months³⁰² as only "a limited basis of approximately one incident per month."³⁰³ In *Cowan v Prudential Insurance Co.*,³⁰⁴ Judge Manion found a lack of pervasiveness because "derogatory name-calling . . . occurred only on Saturday mornings [and] the conversation among co-workers about visits to the strip club was limited to about once a month."³⁰⁵ Abuse occurring "only on Saturday mornings" would, of course, be weekly, regular, and quite foreseeable. In *Penry v Federal Home Loan Bank of Topeka*,³⁰⁶ the harasser had over a three year period followed her "constantly" when she went on break, needlessly touched the victim "on many occasions," and made half

²⁹⁵ 104 F2d 822 (6th Cir 1997).

²⁹⁶ Id at 823-24.

²⁹⁷ 159 F3d 246 (6th Cir 1998).

²⁹⁸ Id at 252.

²⁹⁹ 50 F3d at 430.

³⁰⁰ Id at 431.

³⁰¹ 43 F3d 545 (10th Cir 1994).

³⁰² Id at 549.

³⁰³ Id at 552. The Court of Appeals also was not convinced that this harassment was racially motivated, and referred to the conduct as "general badgering." Id. See also *Sprague v Thorn Americas, Inc.*, 129 F3d 1355, 1366 (10th Cir 1997) (dismissing five incidents over sixteen months as "sporadic").

³⁰⁴ 141 F3d 751 (7th Cir 1998).

³⁰⁵ Id at 758. See also *McKenzie v Illinois Dept of Transportation*, 92 F3d 473, 480 (7th Cir 1996) (holding three incidents in three months to be insufficiently pervasive).

³⁰⁶ 155 F3d 1257 (10th Cir 1998).

a dozen offensive remarks.³⁰⁷ The court of appeals upheld summary judgment for the defendant on the ground that the incidents were "too few and far between."³⁰⁸

Courts using this mechanical approach have concluded that the occurrence of gaps in a pattern of harassment is fatal to a claim of pervasiveness, even when the pattern was so well established that harassment was obviously a "condition" of the job in the sense envisioned by *Harris*. In *DeAngelis v El Paso Municipal Police Officers Association*,³⁰⁹ a jury had found that a hostile work environment had been created by a series of anonymous misogynistic articles that appeared in a police union newsletter. The impact of those articles was indisputable. Each column was printed in a newsletter circulated to 700 to 1000 officers. There was, as the court of appeals conceded, an "uproar of many female police officers at their appearance."³¹⁰ Representatives of the Department testified that they "were embarrassed about and exhorted against" the columns.³¹¹ The police chief responded by circulating two memoranda throughout the entire department. The leaders of the union wanted to require the author to disclose his identity, but the union voted otherwise.³¹² On two occasions, publication of one of the articles led to acts of insubordination on the part of officers under the plaintiff's command.³¹³ Although the series of articles was a cause celebre in the police department, the court of appeals nonetheless concluded that the problem was not "pervasive" because ten articles in thirty months represented just "a few" incidents that were not sufficiently "frequent."³¹⁴

³⁰⁷ Id at 1260-61.

³⁰⁸ Id at 1263. In *Saxton v American Telephone & Telegraph Co*, 10 F3d 526 (7th Cir 1993), the plaintiff alleged that her supervisor "singled her out for particularly harsh treatment after she rebuffed his advances." Id at 529 n 4. Within a five month period, her supervisor "refused to speak with her, treated her in a condescending manner, [] teased her about her romantic interest in a co-worker," canceled several meetings he had scheduled with plaintiff, and seemed generally inaccessible. Id at 529. Nevertheless, the Court of Appeals sustained summary judgment for the defendant, asserting quite inexplicably that there was no evidence the conduct was "frequent." Id at 534. See also *Howard v Beech Aircraft Corp*, 1995 US App LEXIS 14692, *6, *7 (10th Cir) (unpublished disposition) (remarks which were made "frequently" were not "frequent enough").

³⁰⁹ 51 F3d 591 (5th Cir 1995).

³¹⁰ Id at 595.

³¹¹ Id at 596.

³¹² Id at 592.

³¹³ 51 F3d at 596.

³¹⁴ Id at 597. See also *Saxton*, in which the court acknowledged that the perpetrator had made the victim's "life at work subjectively unpleasant," 10 F3d at 535, but nonetheless held that the conduct was not sufficiently "frequent" or "pervasive" to support a Title VII claim. Id at 534.

In *Hopkins v Baltimore Gas & Electric Co.*,³¹⁵ a same-sex harassment case, the perpetrator had, over the course of seven years, allegedly directed repeated off color remarks or sexual propositions at plaintiff, including "frequently" following him into the bathroom when he was there alone.³¹⁶ The problem was obviously one that the victim could reliably have expected to recur, but the Court of Appeals deemed the events not pervasive because the events had "occurred intermittently over a seven-year period, with gaps between incidents as great as a year."³¹⁷

A related misapplication of *Harris* is illustrated by cases in which the victim is for some period physically separated from the harasser. A number of decisions hold that that separation "dissipated" the hostile environment, and that when once again within range of the perpetrator the victim must establish a harassment claim anew with fresh evidence or repeated occurrences, much as if the original harassment had not occurred.³¹⁸ Absent other evidence, however, the physical separation that obstructed the pattern of harassment does nothing to alter the harasser's attitude and, thus, the victim's legitimate fear about his actions. Such a passage of time during which the victim was protected from harassment by separation from the perpetrator is irrelevant where there is "nothing to suggest that the practices changed at all."³¹⁹

Under a system where the frequency of incidents has a controlling, almost mechanical consequence, courts can reach a desired result by manipulating the manner in which incidents are

³¹⁵ 77 F3d 745 (4th Cir 1996).

³¹⁶ Id at 747.

³¹⁷ Id at 753.

³¹⁸ See, for example, *Konstantopoulos v Westvaco Corp.*, 112 F3d 710, 716 (3d Cir 1997) (finding that a seven month "hiatus" allowed the "lingering effects of the prior [harassing] conduct to dissipate"). In *Morrison*, 108 F3d at 439, the court held that, although a formerly laid off employee must prove anew that post-layoff harassment created a hostile work environment, she could rely on pre-layoff harassment to prove the intent behind or likely effect of post-layoff actions.

A related error occurred in *Turner v Reynolds Ford, Inc.*, 1998 US App LEXIS 9552 (10th Cir) (unpublished disposition), in which the alleged harasser had allegedly beaten and raped the plaintiff, and thereafter followed her around while at work and exchanged harsh words with her there. Id at *3-5. The Court of Appeals deemed the assault and rape legally irrelevant because it had not happened at the workplace, id at *15, and then found the at-work events insufficient by themselves to establish a hostile environment. Id at *14. Obviously such a victim would not shed at the office door the fear generated by a prior assault and rape by a still hostile co-worker. The decision in *Turner* stands in stark contrast with *Feltner v Title Search Co.*, 1998 US App LEXIS 21691, *9 (7th Cir) (unpublished disposition) which held that a mere "indirect threat of rape" made outside of the office to a third party would strongly support a hostile environment claim.

³¹⁹ *Stacks v Southwestern Bell Yellow Pages, Inc.*, 27 F3d 1316, 1327 n 5 (8th Cir 1994), quoting *Baggett v Program Resources, Inc.*, 806 F2d 178, 182 (8th Cir 1986).

counted, or disregarded. Judge Manion's decision in *Cowan v Prudential Insurance Co.*³²⁰ is a tour de force of this technique. Regular Saturday morning use of derogatory terms about women was dismissed by the court because it occurred "only" one day a week. Office discussions of visits to the local strip club did not matter, the court of appeals insisted, because there was only one such visit a month. A list of other specific incidents were ruled irrelevant because they were unrelated to one another. The "rampant" sexual joking and "frequent" discussions of exploits at the strip club, referred to at page 756 of the opinion are never mentioned in the discussion of pervasiveness on page 758. And the court simply could not see any evidence that the same supervisor who must have either tolerated or taken part in these events acted with any improper purpose when he generally refused to talk with the plaintiff. In this fashion, the Seventh Circuit was able to conclude that thirteen different types of incidents which had evidently involved scores of occurrences simply were not numerous enough.³²¹ In *Bolden v PRC Inc.*,³²² the Tenth Circuit minimized the significance of the fact that one harasser "often used the term[] . . . 'nigger'"³²³ by emphasizing that perpetrator had only used that particular epithet, not other types of racist language, and stressing that there were "only" two harassers in the case.³²⁴

In other circuits a similar frequency of incidents would be entirely sufficient.³²⁵ The Fifth Circuit has placed sexual harassment plaintiffs in a bizarre dilemma. On the one hand, it has required a large number of incidents to establish pervasiveness. But it also dismissed a plaintiff's claim as untimely when she had failed to complain after only two incidents: the court explained that these two incidents should have put her on notice that she was being harassed.³²⁶ A number of decisions hold that incidents

³²⁰ 141 F3d 751 (7th Cir 1998).

³²¹ See id at 756.

³²² 43 F3d 545 (10th Cir 1994).

³²³ Id at 546.

³²⁴ Id at 551 ("[P]laintiff complains of only two overtly racial remarks (the Ku Klux Klan comment and the use of the term 'nigger.').").

³²⁵ See, for example, *Smith*, 129 F3d at 1415 (holding that six incidents over twenty-three months were sufficient to support a finding of pervasiveness); *Schwapp*, 118 F3d at 112 (holding that one incident every two months over a twenty-month period was sufficient).

³²⁶ *Webb*, 139 F3d at 536-38.

of verbal abuse cannot contribute to a showing of pervasiveness if the victim cannot recall the details of the remarks.³²⁷

The Supreme Court in *Meritor* noted that an "isolated" incident would not ordinarily create a hostile environment. Where a plaintiff proves that she was the victim of a series of abuses, a number of lower court decisions still hold the abuse legally insufficient by ruling that each of the incidents was "isolated" from the others.³²⁸ *Cowan* minimized the significance of the circulation of a sex-related cartoon, distribution of a photograph of one worker with a stripper, and several other incidents on the ground that they were "unrelated" to each other.³²⁹ In *Gross v Burggraf Construction Co.*,³³⁰ the harasser had exclaimed over the company radio about the plaintiff, "[S]ometimes don't you just want to smash a woman in the face."³³¹ The court dismissed the remark as "isolated," meaning both that the court would not cumulate it with any of the other alleged acts of harassment, and that it would not consider the remark in determining whether other facially neutral adverse actions or statements stemmed from hostility to women.³³² On the other hand, in the Federal Circuit, *King v Hillen* correctly stated that assessing each incident in isolation did not give an accurate picture of the working environment.³³³

Although these attempts to fashion a legal standard out of "severe or pervasive" has, perhaps predictably, been a failure, the broad range of problems and circumstances portrayed in the reported cases illuminate the intensely practical nature of the inquiry originally envisioned by *Meritor*. Because harassment can create a discriminatory environment in so many different ways, it seems unwise to attempt to create any uniform legal formula.

³²⁷ See, for example, *Adler v Wal-Mart Stores, Inc.*, 144 F3d 664, 674 (10th Cir 1998) (dismissing claim based in part on sexual comment, where victim "does not recall when this incident occurred"); *Hook v Ernst & Young*, 28 F3d 366, 375, 369 (3d Cir 1994) (dismissing sex discrimination claim based on supervisor's alleged remarks, where plaintiff admitted that she "was unable to recall the exact words, only the embarrassment it caused her"); but see *Dey*, 28 F3d at 1456.

³²⁸ For example, in *Black v Zaring Homes, Inc.*, 104 F3d 822 (6th Cir 1997), the plaintiff was subjected to a variety of obnoxious comments at the firm's regular bi-weekly meetings, as well as a number of other abuses, all within a four month period. *Id.* at 823-24. In response to the plaintiff's assertion that during this same period she was the subject of an inappropriate remark at an office dinner, the court dismissed that as a "isolated incident." *Id.* at 824 n 2.

³²⁹ 141 F3d at 758.

³³⁰ 53 F3d 1531 (10th Cir 1995).

³³¹ *Id.* at 1542.

³³² *Id.* at 1543.

³³³ 21 F3d 1572, 1581 (Fed Cir 1994) ("[B]y viewing each incident in isolation, as if nothing else occurred, a realistic picture of the work environment was not presented.").

VI. "HOSTILE OR ABUSIVE" ENVIRONMENT

The core idea behind the *Rabidue* serious psychological injury doctrine was that, even where acts of sexual harassment had adversely altered a plaintiff's work environment, the alteration would have to be unusually severe before it violated the law. The Sixth Circuit decision in *Rabidue* actually required a plaintiff to prove six different elements: (1) that the harassment had caused her serious psychological injury, (2) that the harassment would have caused serious psychological injury to a reasonable victim, (3) that the harassment unreasonably interfered with her job performance, (4) that the harassment would have interfered with the job performance of a reasonable victim, (5) that she was actually offended by the harassment, and (6) that she suffered some degree of injury as a result.³³⁴ Manifestly it was likely that many plaintiffs in sexual harassment cases would not be able to establish any of the first four elements. On the other hand, the Third Circuit decision rejecting *Rabidue* framed what it believed to be the correct standard, not in terms of the magnitude of its harm to the plaintiff, but in terms of the resulting nature of the environment, insisting that Title VII would be violated by "an atmosphere of sexism."³³⁵ Although the *Rabidue* approach was particularly extreme, the language of both *Meritor* and the EEOC Guidelines on which it relied do pose a significant question: if harassment has in fact altered the environment of a plaintiff, what degree of alteration is sufficient to be "hostile" or "abusive"?

As did *Meritor* before it, *Harris* should have made clear that Title VII forbade any significant alteration in working conditions that is adverse to a protected group, not only those alterations that reach some special level of adversity. Although *Meritor* at times described the actionable environment as "abusive" or "hostile," it also repeatedly used the term "offensive."³³⁶ In *Harris*, Justices Scalia and Ginsburg expressly addressed this issue and reached the same conclusion. Scalia asserted that the test was "whether working conditions have been discriminatorily altered,"³³⁷ while Ginsburg maintained that "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of

³³⁴ *Rabidue v Osceola Refining Co*, 805 F2d 611, 620, 622 (6th Cir 1986).

³³⁵ *Andrews v City of Philadelphia*, 895 F2d 1469, 1486 (3d Cir 1990).

³³⁶ *Meritor Savings Bank, FSB v Vinson*, 477 US 57, 65, 66 (1986).

³³⁷ *Harris v Forklift Systems, Inc*, 510 US 17, 25 (1993) (Scalia concurring).

the other sex are not exposed."³³⁸ In the 1998 decision in *Oncale v Sundowner Offshore Services, Inc.*,³³⁹ Justice Scalia, writing for the Court, quoted this very passage from Justice Ginsburg's concurring opinion in *Harris*.³⁴⁰

Despite the decision in *Harris*, the lower courts are sharply divided about what type of alteration in the conditions of a plaintiff's employment is required to establish a Title VII violation. Several Eighth Circuit cases expressly follow the *Harris* and *Oncale* standard. Three Eighth Circuit cases specifically quote the formulation of Justice Ginsburg that the altered employment conditions created by the harassment need only be "disadvantageous."³⁴¹ Other decisions in the Eighth Circuit,³⁴² like controlling precedent in the Tenth,³⁴³ Eleventh,³⁴⁴ and Federal³⁴⁵ Circuits, contain no requirement regarding the degree that the conditions of employment must be changed, so long as the harassment alters those conditions at all. Because any acts of harassment would, virtually by definition, involve actions adverse to the plaintiff, the alteration in employment conditions caused by any such harassment would necessarily be adverse as well. Thus this line of decisions is quite consistent with *Harris* and *Oncale*, albeit illustrating that the requirement in those cases that the alteration be disadvantageous is somewhat superfluous. The Third Circuit requires proof that the "discrimination would detrimentally affect a reasonable person of the same sex in that position."³⁴⁶ In practice this too seems the equivalent of the *Harris-Oncale* formulation, since disadvantageous conditions of employment would have a detrimental effect on a reasonable person.

Three circuits, on the other hand, follow the original *Rabidue* approach, insisting that Title VII is violated not where harass-

³³⁸ Id (Ginsburg concurring).

³³⁹ 523 US 75 (1998).

³⁴⁰ Id at 80.

³⁴¹ *Hathaway v Runyon*, 132 F3d 1214, 1222 (8th Cir 1997); *Stacks v Southwestern Bell Yellow Pages, Inc.*, 27 F3d 1316, 1327 (8th Cir 1994); *Kopp v Samaritan Health System, Inc.*, 13 F3d 264, 269 (8th Cir 1993).

³⁴² *Bales v Wal-Mart Stores, Inc.*, 143 F3d 1103, 1106 (8th Cir 1998); *Todd v Ortho Biotech, Inc.*, 138 F3d 733, 736 (8th Cir 1998); *Crist v Focus Homes, Inc.*, 122 F3d 1107, 1110 (8th Cir 1997); *Callanan v Runyon*, 75 F3d 1293, 1296 (8th Cir 1996).

³⁴³ *Aramburu v Boeing Co.*, 112 F3d 1398, 1410 (10th Cir 1997) (race discrimination case); *Bolden v PRC Inc.*, 43 F3d 545, 551 (10th Cir 1994) (same).

³⁴⁴ *Mendoza v Borden, Inc.*, 158 F3d 1171, 1175 (11th Cir 1998); *Cross v Alabama*, 49 F3d 1490, 1504 (11th Cir 1995).

³⁴⁵ *King v Hillen*, 21 F3d 1572, 1583 (Fed Cir 1984).

³⁴⁶ *Knabe v Boury Corp.*, 114 F3d 407, 410 (3d Cir 1997); *Aman v Cort Furniture Rental Corp.*, 85 F3d 1075, 1081 (3d Cir 1996); *West v Philadelphia Electric Co.*, 45 F3d 744, 753 (3d Cir 1995); *Spain v Gallegos*, 26 F3d 439, 447 (3d Cir 1994).

ment merely causes employment conditions that are worse for women than for men, but only where those conditions are far, far worse. The origins of this doctrine in the Seventh Circuit are somewhat mystifying. Three 1994 Seventh Circuit decisions were entirely consistent with *Harris*. The first decision, *Dey v Colt Construction & Development Co.*,³⁴⁷ handed down by a panel which happened to include the only woman then on the Seventh Circuit, adopted the standard in Justice Scalia's statement in *Harris*. It maintained that "[a]s Justice Scalia separately explained in *Harris*, the test under Title VII 'is not whether work has been impaired, but whether working conditions have been discriminatorily altered.'"³⁴⁸ Subsequently, Judge Posner, in a decision joined by the author of *Dey*, took the same position:

All [the plaintiff] need show is that her conditions of employment were adversely affected. If because she was a woman [her employer] had turned down the heat at her work station in order to make her uncomfortable, that would be actionable sex discrimination, even if the discomfort inflicted was too mild to be described as "suffering."³⁴⁹

Later in the same year, *Doe v R.R. Donnelley & Sons Co.*,³⁵⁰ cited *Dey* for the rule that the controlling standard was only "whether the offensive acts alter the conditions of employment."³⁵¹ Thus by the end of 1994 not only was this doctrine clearly the law of the circuit, but a majority of the active members of the circuit had joined opinions expressly endorsing that view.³⁵²

Three months later a new Seventh Circuit panel decided *Baskerville v Culligan International Co.*³⁵³ Disregarding without explanation the last three Seventh Circuit decisions on this issue, including his own opinion in *Carr*, Judge Posner insisted that

³⁴⁷ 28 F3d 1446 (7th Cir 1994).

³⁴⁸ Id at 1454-55, quoting *Harris*, 510 US at 25 (Scalia concurring). The court went on to state that "[t]he criterion is . . . whether the offensive acts alter the conditions of employment." Id at 1455 (emphasis omitted), quoting *King v Hillen*, 21 F3d 1572 (Fed Cir 1994). Three years after *Baskerville*, a decision from a panel including Judges Rovner and Diane Wood overturned an award of summary judgment for an employer, relying on a series of incidents all but one of which would appear not to be cognizable under *Baskerville*. See *Feltner v Title Search Co.*, 1998 US App LEXIS 21691, *8-10 (7th Cir) (unpublished disposition).

³⁴⁹ *Carr v Allison Gas Turbine Division*, 32 F3d 1007, 1011 (7th Cir 1994).

³⁵⁰ 42 F3d 439 (7th Cir 1994).

³⁵¹ Id at 444.

³⁵² Judges Cummings, Flaum, Posner, Ripple, and Rovner joined in these opinions. Judge Coffey dissented in *Carr*.

³⁵³ 50 F3d 428 (7th Cir 1995).

Title VII was not violated by harassment which created an adverse or uncomfortable environment, but only by harassment which resulted in truly horrific conditions: "The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women."³⁵⁴ The critical distinction, he explained was between "a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other."³⁵⁵ Later decisions in the Tenth, Seventh and Fourth circuits expressly apply the *Baskerville* standard, holding that Title VII is not violated by harassment or other discrimination which alters the conditions of employment and creates an "unpleasant" environment, but only by practices which bring about a "hellish" or "repugnant" environment.³⁵⁶

Decisions following *Baskerville* use the facts of that decision as a "yardstick," dismissing as legally insufficient complaints whose facts seem less egregious than the allegations held inadequate in that case. This methodology has led to a certain amount of manipulation. For example, in *Baskerville*, the Seventh Circuit stressed that the harasser's purely verbal actions were not in any way intimidating or threatening.³⁵⁷ Four years later in *Hardin v S.C. Johnson & Son, Inc.*,³⁵⁸ the plaintiff alleged that the harasser had slammed a door in her face, driven up behind her without warning in an electric cart, and cut her off in a parking lot.³⁵⁹ In dismissing these allegations as legally insufficient, the Seventh

³⁵⁴ Id at 430.

³⁵⁵ Id at 431.

³⁵⁶ *Penry v Federal Home Loan Bank of Topeka*, 155 F3d 1257, 1263 (10th Cir 1998) (noting that "[w]e have no doubt that the plaintiffs worked in an unpleasant environment," but holding that the workplace was not "permeated with discriminatory intimidation"); *Turner*, 1998 US App LEXIS 9552 at *14 (finding harassment insufficient because it was no worse than "unpleasant"); *Hartsell v Duplex Products Inc*, 123 F3d 766, 773 (4th Cir 1997) ("[A]llowing [plaintiffs'] claim to go to trial would countenance a federal cause of action for mere unpleasantness."); *Brill v Lante Corp*, 119 F3d 1266, 1274 (7th Cir 1997); *Gleason v Mesirow Financial, Inc*, 118 F3d 1134, 1145 (7th Cir 1997) (holding that "unpleasantness per se" is not a valid Title VII claim) (citation omitted); *Koelsch v Beltone Electronics Corp*, 46 F3d 705, 708 (7th Cir 1995) (noting that atmosphere may have been "unpleasant" but it was not "poisoned"); *Saxton v American Telephone & Telegraph Co*, 10 F3d 526, 535 (7th Cir 1993) (holding that although supervisor's "inaccessibility, condescension, impatience, and teasing made [plaintiff's] life at work subjectively unpleasant," summary judgment was appropriate because there was no evidence that the environment was "hostile").

³⁵⁷ 50 F3d at 430-31.

³⁵⁸ 167 F3d 340 (7th Cir 1999).

³⁵⁹ Id at 343 (noting that the harasser "made no threats" and finding that "[i]t is a little difficult to imagine a context that would render [supervisor's] sallies threatening").

Circuit insisted that *Baskerville* "involved more intimidating and threatening actions."³⁶⁰

In the Sixth Circuit, *Black v Zaring Homes, Inc.*³⁶¹ held that the types of harassing conduct in that case were, by their very nature, too mild to support a Title VII claim, however often they might have occurred. But in *Abeita v Transamerica Mailings, Inc.*,³⁶² the author of *Black* said the opposite, insisting that the incidents in *Black* were indeed sufficiently serious, and that the plaintiff in *Black* had lost only because the incidents were infrequent.

In addition, the Fourth,³⁶³ Fifth,³⁶⁴ and Sixth³⁶⁵ circuits also insist that a sexual harassment plaintiff prove that the discrimination interfered with her job performance, even though in *Harris* the Supreme Court expressly considered and rejected such a requirement. The situation in the Sixth Circuit is particularly surprising. Five years after *Harris*, where the Supreme Court specifically disapproved of this aspect of the *Rabidue* rule, Sixth Circuit opinions still quote or cite *Rabidue* for the very proposition that a plaintiff must show that harassment "had the effect of unreasonably interfering with the plaintiff's work performance."³⁶⁶ This continued reliance on *Rabidue* is not loose talk or a judicial oversight: a majority of the active members of the Sixth Circuit have joined at least one of these opinions.³⁶⁷ These decisions have specifically rejected sexual harassment claims on the ground that the plaintiff had not shown the requi-

³⁶⁰ Id at 346; but see *Smith v Sheahan*, 1999 US App LEXIS 20279, *11 (7th Cir) (opinion of Diane Wood) (holding that a single incident of harassment, in which a male supervisor inflicted serious bodily injury on a female employee, could support a claim under Title VII).

³⁶¹ 104 F3d 822 (6th Cir 1997).

³⁶² 159 F3d 246 (6th Cir 1998).

³⁶³ *Hopkins*, 77 F3d at 753-54 (holding that harassment must be "of the type that would interfere with a reasonable person's work performance . . . to the extent required by Title VII"), quoting *Morgan v Massachusetts General Hospital*, 901 F2d 186, 193 (1st Cir 1990).

³⁶⁴ See notes 373-76.

³⁶⁵ See notes 366-70.

³⁶⁶ *Rabidue*, 805 F2d at 619. See also *Peecook v Northwestern Natl Ins Group*, 1998 US App LEXIS 18265, *8 (6th Cir) (unpublished disposition); *Harrington v Boysville of Michigan, Inc.*, 1998 US App LEXIS 9796, *13 (6th Cir) (unpublished disposition); *Logan v Royal Oak Township Public Safety Dept.*, 1997 US App LEXIS 26507, *2-3 (6th Cir) (unpublished disposition); *Barnes v Montgomery County Board of Education*, 1997 US App LEXIS 11539, *5 (6th Cir) (unpublished disposition); *Fleenor v Hewitt Soap Co.*, 81 F3d 48, 49 (6th Cir 1996); *Harrison v Metropolitan Govt of Nashville*, 80 F3d 1107, 1118 (6th Cir 1995).

³⁶⁷ Judges Batchelder, Boggs, Cole, Jones, Martin, Merritt, Moore, Nelson, Ryan, Siler, and Suhrheinrich.

site degree of job interference. In *Harrison v Metropolitan Government of Nashville*,³⁶⁸ a race harassment case, the constant harassment was so serious that the plaintiff was diagnosed with insomnia, was "under a great deal of stress," and often "couldn't hardly think a lot during the day."³⁶⁹ The Sixth Circuit overturned the lower court's finding of actionable harassment because "the plaintiff has failed to present evidence that his work performance was affected by the racial hostility."³⁷⁰

The Fourth Circuit requires "interfere[nce]" with job performance;³⁷¹ the Sixth Circuit demands somewhat more, "unreasonabl[e]" interference.³⁷² The Fifth Circuit goes even further, requiring proof both that the harassment was "so severe and pervasive that it destroys a protected classmember's opportunity to succeed in the workplace,"³⁷³ and that the abuse conveyed an explicit or covert "message that the plaintiff is incompetent because of her sex."³⁷⁴ The latter requirement is particularly limiting, since most sexual harassment, even the rape alleged in *Meritor*, is unlikely to convey any message about the victim's ability to do her job. In *Butler v Ysleta Independent School District*,³⁷⁵ the court held that a series of letters, some sexual in nature, sent to a teacher by her principal, were not actionable because they did not relate to her professional competence. In the court's view "a cartoon suggesting that women are incapable of teaching on account of their sex might undermine the ability of women to teach," but ordinary pornography, sexually explicit remarks or unwanted touching would not.³⁷⁶

As the Tenth Circuit, the First Circuit, and a pre-*Baskerville* decision in the Seventh Circuit have appropriately observed,³⁷⁷ this requirement of interference with job performance is palpably inconsistent with *Harris* (and now with *Oncale*). In *Harris*, the defendant employer argued that a sexual harassment plaintiff

³⁶⁸ 80 F3d 1107 (6th Cir 1996).

³⁶⁹ Id at 1118.

³⁷⁰ Id.

³⁷¹ *Hopkins*, 77 F3d at 753 (4th Cir 1996).

³⁷² See note 366 and accompanying text.

³⁷³ *Shepherd v Comptroller of Public Accounts*, 168 F3d 871, 874 (5th Cir 1999), quoting *Weller v Citation Oil & Gas Corp*, 84 F3d 191, 194 (5th Cir 1996); see also *DeAngelis v El Paso Municipal Police Officers Assn*, 51 F2d 591, 593 (5th Cir 1995).

³⁷⁴ *Shepherd*, 168 F3d at 974, quoting *Butler v Ysleta Independent School Dist*, 161 F3d 263, 270 (5th Cir 1998).

³⁷⁵ 161 F3d 263 (5th Cir 1998).

³⁷⁶ Id at 270.

³⁷⁷ See *Davis v United States Postal Service*, 142 F2d 1334, 1341 (10th Cir 1998); *Scarfo v Cabletron Systems, Inc*, 54 F3d 931, 945-46 (1st Cir 1995); *Dey*, 28 F3d at 1455.

must prove that the harassment interfered with her job performance.³⁷⁸ The majority clearly rejected such a requirement, instead indicating only that the presence or absence of such interference would be relevant evidence.³⁷⁹ Justice Scalia observed that "the test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."³⁸⁰ Indeed, the contention that harassment is not illegal unless it interferes with job performance — an interference which would either cause or at least threaten economic injury — seems only a variant of the argument rejected in *Meritor* that a plaintiff must prove "tangible loss" of an "economic character."³⁸¹

The practical significance of these requirements of hellaciousness or interference with job performance is highlighted by the earlier proceedings in these cases. In a number of instances the cases had gone to trial and juries had awarded compensatory damages for injuries caused by the alleged harassment: \$10,000 in *DeAngelis*,³⁸² \$25,000 in *Baskerville*,³⁸³ and over \$150,000 in *Barnes*.³⁸⁴ In none of these cases did the courts of appeals which overturned the liability finding question the amount of the verdict or suggest that the defendant had challenged it as excessive.³⁸⁵ That fact, on reflection, is not really surprising. The

³⁷⁸ See Brief for Respondent, *Harris v Forklift Systems, Inc.*, 510 US 17 (1993), available at 1993 WL 757644, *27-28:

In hostile environment cases it is especially important to demonstrate that conduct interferes with work performance. Requiring a plaintiff to show a nexus between conduct and ability to perform the job is particularly appropriate in cases such as this one. . . . [H]ostile environment plaintiffs bear the burden of demonstrating some nexus between offensive conduct and their ability to perform their jobs.

³⁷⁹ 510 US at 23:

Whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . [N]o single factor is required.

(Emphasis added).

³⁸⁰ Id at 25 (Scalia concurring).

³⁸¹ 477 US at 64.

³⁸² 51 F3d at 593.

³⁸³ 50 F3d at 430.

³⁸⁴ 1997 US App LEXIS 11539 at *4.

³⁸⁵ In *Kimzey v Wal-Mart Stores, Inc.*, 107 F3d 568 (8th Cir 1997), it is clear from the opinion that the defendant which unsuccessfully attacked the jury's finding of a hostile work environment never challenged the size of the \$35,000 compensatory award.

decisions in these cases never questioned that the alleged harassment had occurred, and never suggested that such harassment could not cause very real harm. They held, rather, that the harassment was legal, which necessarily meant that the employers could with impunity ignore, encourage, or even order that that harassment occur. Similarly, in *Harrison*, the district court's finding of racial harassment was part of a contempt proceeding, and the only remedy awarded for that violation was injunctive relief.³⁸⁶ The effect of the Sixth Circuit decision, and the purpose of this part of the employer's appeal, was to vacate a two-year old injunction intended to protect the black plaintiff from racial epithets and Ku Klux Klan incidents; in its wake the defendant's manager was once again free to engage in such activity.

VII. "ACCEPTANCE" OF HARASSMENT AND JOB-SPECIFIC EXEMPTIONS

In a passage quoted with express approval by Judge Krupansky in *Rabidue v Osceola Refining Co.*,³⁸⁷ Judge Newblatt indicated that the requirements of Title VII would vary from job to job. He emphasized that "in some work environments" lewd language and explicit pictures may abound. Newblatt's insistence that Title VII was not intended to change social mores suggested that the law should not be construed to forbid such practices at jobs where they were prevalent. Judge Krupansky offered a rationale for such an exemption from normal sexual harassment prohibitions, arguing that courts should consider

the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.³⁸⁸

This would recognize a sort of assumption of risk exception to Title VII, at least with regard to sexual harassment. Women who voluntarily take jobs where they knew harassment is prevalent could not complain that they reasonably expected better treatment.

³⁸⁶ 80 F3d at 1112.

³⁸⁷ 805 F2d 611 (6th Cir 1985).

³⁸⁸ *Id* at 620.

These implications are not a mere slip of the judicial pen. Judge Keith in his dissenting opinion pointed out quite precisely the meaning of Krupansky's statements. The reference to women "voluntarily" accepting employment with known harassers, he objected, meant that women would waive any rights by taking such jobs, and that those "work environments somehow have an innate right to perpetuation."³⁸⁹ Keith pointedly asked whether under the majority's interpretation of Title VII the statute would also be inapplicable to other situations in which bigotry was open and notorious. For example, he asked about the applicability of Title VII to an employer that "maintains an anti-semitic workforce and tolerates a workplace in which 'kike' jokes, displays of nazi literature and anti-Jewish conversation 'may abound.'"³⁹⁰

This job-specific exception to Title VII appears to have survived *Harris* only in the Tenth Circuit.³⁹¹ In *Gross v Burggraf Construction Co.*,³⁹² the court established a separate standard for assessing harassment claims in certain blue collar jobs:

In determining whether [plaintiff] has established a viable Title VII claim, we must first examine her work environment. In the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior.

...

Accordingly, we must evaluate [her] claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments.³⁹³

Two aspects of this passage are noteworthy. First, Judge Alarcón provides no explanation — and none readily comes to mind — of

³⁸⁹ Id at 626 (Keith dissenting).

³⁹⁰ Id.

³⁹¹ Prior to *Harris*, the Tenth Circuit had seemingly endorsed the approach in *Sauers v Salt Lake County*, 1 F3d 1122, 1126 (10th Cir 1993) (affirming judgment for defendant where the district court found that employers' "unusually rough, sexually explicit, and raw atmosphere" was "known and accepted or tolerated by all concerned personnel, male and female alike").

³⁹² 53 F3d 1531 (10th Cir 1995).

³⁹³ Id at 1537-38.

how he or Judge Anderson or Judge McWilliams would know what types of vulgarity routinely characterized construction projects in Wyoming in 1989. If any of the judges had worked on such projects in his youth, that would have been decades earlier, almost certainly not in Wyoming,³⁹⁴ and assuredly before the time when any significant number of women held such positions. Second, as did the opinions in *Rabidue*, Judge Alarcón does not actually find that all the women on such jobs are not bothered by such conduct, but only that they "accep[t] or endur[e]" or "tolerat[e]" it. Subsequently, *Smith v Norwest Financial Acceptance, Inc.*,³⁹⁵ described *Gross* as holding that "the rough and tumble surroundings of the construction industry can make vulgarity and sexual epithets common and reasonable conduct."³⁹⁶ There was undoubtedly a time when, in many parts of the country, the use of racial epithets was common on construction sites. Neither *Gross* nor *Smith*, however, offered an explanation of why Title VII should prohibit racist remarks but not sexist remarks.

Somewhat inexplicably, between the decisions in *Gross* and *Smith* a third Tenth Circuit panel took a different approach. In *Winsor v Hinckley Dodge, Inc.*,³⁹⁷ the plaintiff complained that her supervisor had called her a "floor whore."³⁹⁸ The employer sought to prove that this term was generally used by car dealers to refer to female sales workers. The court deemed such usage legally irrelevant:

Testimony by defendant's former manager that "floor whore" is an industry term does not negate its sexually derogatory character. Just as we would not sanction an industry term that is facially derogatory to a particular racial or ethnic group, we cannot accept the argument that industry use of an inherently sex-related term neutralizes its detrimental effect on women.³⁹⁹

The argument rejected in *Winsor* was narrower than the more sweeping exception accepted in *Gross*, since it would have immunized only a single phrase, not an entire industry. In *Jenson v Eveleth Taconite Co.*,⁴⁰⁰ the Eighth Circuit went even further than

³⁹⁴ The judges were from Los Angeles, Salt Lake City and Denver.

³⁹⁵ 129 F3d 1408 (10th Cir 1997).

³⁹⁶ *Id.* at 1414.

³⁹⁷ 79 F3d 996 (10th Cir 1996).

³⁹⁸ *Id.* at 998.

³⁹⁹ *Id.* at 1001.

⁴⁰⁰ 130 F3d 1287 (8th Cir 1997).

Winsor, holding that the existence of the sort of widespread practice assumed by *Gross* to be common in the construction industry actually *underscored* the culpability of an employer.⁴⁰¹

CONCLUSION

Noticeably absent from the five years of litigation after *Harris* have been disputes about seemingly benign conduct which an arguably oversensitive plaintiff or court sought to label as harassment. Although there has been an ongoing public debate about the location of or ambiguity in the distinction between proper and improper conduct, that controversy has no significant counterpart in actual litigation. Supervisors and co-workers do struggle at times to ascertain when a mildly racy joke might be out of bounds, or whether asking out a colleague or subordinate would be inappropriate; but, insofar as one can tell from reported appellate decisions, employers do not get sued over those fine distinctions. In the cases in which more conservative judges refused to find a violation of Title VII, those judges often have gone out of their way to criticize the underlying conduct complained of. Far from generally suggesting that the alleged harassers were innocents who were wrongfully attacked for a well-intentioned compliment or for seeking romance in an artless manner, the courts branded the culprits as crude, abusive, mean-spirited or misogynists.

There is undeniably a wide range in the severity of the harassment that has been the subject of this lower court litigation, just as there was an enormous difference between the alleged rapes in *Meritor* and the off-color remarks in *Harris*. Judicial efforts in the Fourth, Fifth, Sixth and Seventh Circuits to draw some mechanical legal distinction between various levels of harassment have been palpably unsuccessful. The lower level harassment which these decisions seek to place outside the protections of Title VII undeniably caused real harm. None of the decisions which overturned jury verdicts have suggested that the size of the compensatory award was excessive, or that it had even been challenged. Milder forms of harassment cause lesser injuries, but the injuries are no less real. Under the Seventh Circuit's "safe harbor" doctrine, the harassment found to have caused

⁴⁰¹ Id at 1292 ("We emphatically reject the Special Master's conclusion . . . that the fact that the culture of the Iron Range mining industry allowed sexual harassment is a mitigating factor for [defendant]. . . . Instead, we find this observation underscores the overall culpability of [defendant].") (citation omitted).

\$25,000 in damages in *Baskerville* was entirely lawful under Title VII. No member of that circuit, however, would conceivably recognize a safe harbor for \$25,000 in salary discrimination, or even \$25, and justifiably so. There may be academics who might regard a \$25 difference in wages as far more serious than \$25,000 in emotional injury, but over a decade ago *Meritor* forbade just that sort of distinction.

In addition, at a point in the nation's history when the overwhelming majority of federal judges are still men, and when appellate panels with a majority of women remain a statistical anomaly, it is simply unseemly for the federal courts to be about the business of announcing what types of abuse women find "merely offensive" as opposed to "deeply offensive," or to be formulating rules about what types of harassment women will just have to put up with. Sexual harassment on the job is not just about sex; it is about power, most often the power of a male superior, wielding an implicit threat to the livelihood of the non-compliant, to compel a female subordinate to submit to verbal or other abuse which he could not inflict on other women. Federal judges blessed with life tenure often seem uniquely unable to understand the dynamics of such a situation, or to realize that a remark which would be merely annoying from a stranger at a singles bar could be far more demeaning and threatening from one's boss.

The appropriate response of the legal system to less severe forms of harassment should be the same as its response to less severe physical assaults — lower damages. Judicial efforts to delineate a safe harbor for lower level harassment seek to impose an all-or-nothing rule to cases involving differences in degree; damages, on the other hand, can be calibrated to take into account just those types of differences. Assessed from this perspective, juries have proven to be up to the task of making the needed distinctions. In the leading Fifth, Sixth and Seventh Circuit cases, the harassment was obviously less extreme than in *Meritor*, but the awards were often appropriately modest — \$50,000 in *Black*, \$25,000 in *Baskerville*, and only \$10,000 in *DeAngelis*.⁴⁰² There is, of course, no assurance that that will always be the case; but the appropriate judicial response to the possibility of large awards in mild cases is not to legalize the underlying conduct, but for district judges to use their authority to award new trials where damages are grossly excessive. If a district judge

⁴⁰² See notes 382–84 and accompanying text.

abuses that discretion by failing to order such a new trial, appellate courts have authority to intervene.⁴⁰³

But that appellate authority is far different in kind from the types of judicial intervention that have occurred since *Harris*, and will restrict federal appellate judges to a decidedly more limited and more appropriate role in sexual harassment cases.

⁴⁰³ *Gasperini v Center for Humanities, Inc.*, 518 US 415, 436 (1996).

